Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1995

DAVID L. WILKINSON,

Petitioner,

v.

LEGAL SERVICES CORPORATION
And The UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is Petitioner barred under the doctrine of "constitutional estoppel" from challenging the appointments of new directors of the Legal Services Corporation in a wrongful termination suit, merely because (a) as an employee of the corporation, he had continued to be paid following the new directors' appointments, pursuant to a pre-existing employment contract, and (b) he was a passive recipient of annual cost-of-living salary increases and additional insurance benefits that were implemented while the challenged directors were in control of the corporation?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David L. Wilkinson requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit issued on April 9, 1996.

OPINIONS BELOW

The opinion of the court of appeals, reproduced in the Appendix at A1-A8, is reported at 80 F.3d 535 (D.C. Cir. 1996). The initial opinion of the district court, granting summary judgment for Petitioner, is reported at 865 F.Supp. 891 (D.D.C. 1994) and appears in the Appendix at A11-A35. A further opinion of the district court that accompanied its final judgment, issued April 12, 1995, is set out in the Appendix at A36-A41; it is not officially reported.

JURISDICTION

The court of appeals entered its judgment on April 9, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Art. II, Sec. 2, Cl. 2:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law....

U.S. Constitution, Art. II, Sec. 2, Cl. 3:

> The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

U.S. Constitution, Art. III, Sec. 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States. . . .

U.S. Constitution, Amendment 1:

> Congress shall make no law . . . abridging . . . the right of the people peaceably . . . to petition the Government for a redress of grievances.

Legal Services Corporation Act, 42 U.S.C §§ 2996 et seq.:

> ***§ 2996b(a).*** There is established in the District of Columbia a private nonmembership nonprofit corporation, which shall be known as the Legal Services Corporation, for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.
>
> ***§ 2996c(a).*** The Corporation shall have a Board of Directors consisting of eleven voting members appointed by the President, by and with the advice and consent of the Senate, no more than six of whom shall be of the same political party. A majority shall be members of the bar of the highest court of any State, and none shall be a fulltime employee of the United States. ... [T]he membership of the Board shall be appointed so as

to include eligible clients, and to be generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public.

§ 2996c(b). The term of office of each member of the Board shall be three years. . . . Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified. * * *

§ 2996c(c). The members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States.

§ 2996d(e)(1). Except as otherwise specifically provided in this title, . . . the Corporation shall not be considered a department, agency, or instrumentality, of the Federal Government.

STATEMENT OF THE CASE

Petitioner is a former employee of respondent Legal Services Corporation ("LSC"). LSC is a private, nonprofit corporation established by the Legal Services Corporation Act of 1974 ("LSC Act"), 42 U.S.C. §§ 2996 *et al.*, to provide financial support for legal assistance to the poor. § 2996b(a). It is managed by a board of directors of eleven members appointed by the President, by and with the advice and consent of the Senate. § 2996c(a). The statute provides that the Corporation "shall not be considered a department, agency or instrumentality of the Federal Government," and the members of its board of directors are not deemed to be officers or employees of the United States. §§ 2996c(c), 2996d(e)(1).

In 1988, Congress amended the Inspector General Act of 1978, requiring LSC to appoint a full time Inspector General with power to conduct audits and investigations, promote economy, and prevent and detect fraud and abuse in LSC's programs and operations, among other functions. 5 U.S.C. App. 3 § 8E, added by Pub. L. 100-504, § 104(a), 102 Stat. 2522 (1988). Petitioner was hired as the first Inspector General of LSC, commencing on September 5, 1989. The employment contract provided for an initial two-year term, to be automatically renewed on a year-to-year basis thereafter, subject to LSC's right to terminate the arrangement by written notice at least six months before Petitioner's employment anniversary date, *i.e.* not later than March 5th each year.

Within a few months after Petitioner started his new job at LSC, the entire board of directors was replaced. (A-2). All of the new board members were given recess appointments by President Bush, made while the Senate was in recess in late 1989 and early 1990, and none of them were confirmed by the Senate. *Id.* Those appointments expired by their terms when the Senate adjourned on October 28, 1990 — but not before the recess-appointed directors replaced LSC's former president with a new incumbent, who assumed sole and unfettered control of the corporation during the absence of any recognized board members. For over two months, LSC ostensibly had no board of directors at all. In early January, 1991, President Bush again filled the LSC board with a full slate of recess appointees, including many of the same people he had appointed the previous year —

none of whom were ever confirmed.[1] *Id.* Shortly thereafter, on February 22, 1991, the 1991 recess appointees voted to terminate Petitioner's employment as Inspector General, and timely notice of that action was given to Petitioner.

Before his termination took effect in September 1991, Petitioner filed suit against LSC in the United States District Court for the District of Columbia. The complaint, in Count II, challenged the authority of the 1991 recess appointees to dismiss him on grounds, *inter alia*, that their appointments were invalid and they had not qualified to serve as members of the LSC board.[2] Subject matter jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1332 and 5 U.S.C. § 552b(h)(1). The Department of Justice ("DOJ") intervened as a defendant in the name of the United States in order to address the difficult and serious issues of

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[1] Incredibly, as the court of appeals noted, 75% of all presidential recess appointments between 1989 and 1992 were made to the LSC board of directors. (A2, n.1). However, all but one of the directors in office when Wilkinson was hired had been appointed by President Reagan with Senate confirmation.

[2] Count I of Petitioner's complaint asserted a claim under the Government in the Sunshine Act, 5 U.S.C. § 552b. The district court entered injunctive relief for Petitioner on that count (A42). LSC complied with that directive, and it is not at issue here.

Presidential power under the Recess Appointments Clause of the Constitution and the LSC Act.[3]

On cross motions for summary judgment, the district court denied the motions of LSC and the United States and granted partial summary judgment for Petitioner. (A11-A35). It first rejected Petitioner's argument that, because the statute set up LSC as a "private" District of Columbia corporation and specified that its directors are "not...officers of the United States," *see* 42 U.S.C. § 2996c(c), the President lacks authority under the Recess Appointments Clause, Art. II, § 2, cl. 3, to make any such appointments to the LSC board without Senate confirmation.[4] The district court went

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[3] LSC agrees that its history "demonstrates that concern over the use of recess appointments to the board, and the resulting effect on the stability of LSC, is not hypothetical." Brief of Appellant Legal Services Corporation, *Wilkinson v. LSC*, D.C. Cir., No. 95-5144, at 15 (Nov. 21, 1995). As it noted, LSC was governed almost exclusively by recess appointees between 1980 and 1993, with only eleven of the fifty-four people who served as directors during that period receiving Senate confirmation. Seven persons served three consecutive recess appointments — equivalent to a full term — and one had four consecutive appointments. In 1990 and 1991, the President appointed the entire 11-member board, contrary to the LSC Act's scheme of staggered terms. "The use of cumulative recess appointments in this fashion certainly raises a question of constitutional significance...[and] bears upon the statutory objective that LSC be free from political influence." *Id.* at 16 (citations omitted).

[4] The Court's view was that the statute most likely uses "officers" only in a statutory sense, to limit the statutory

on to hold, however, that the board appointments were invalid, because no "vacancies" existed to which recess appointments could be made. That ruling was based on the holdover provision in the LSC Act, § 2996c(b), under which each member of the board "shall continue to serve" until a successor is appointed and qualified. (A22-A34). As the district court explained,

> based upon the language of the LSC Act and the language omitted from the LSC Act, and in the absence of any persuasive legislative history to the contrary, a vacancy does not occur on the LSC Board upon the expiration of a term of office of one of the Directors. A vacancy is created on the Board upon the resignation, death or removal of one of the sitting Directors. This conclusion does not, as the Government suggests, render the statute unconstitutional. The holdover provision does not infringe upon the President's recess appointment power, it merely defines when "vacancies" exist on the LSC Board sufficient to trigger application of the Recess Appointments Clause. (A34).

On April 12, 1995, after further proceedings, the district court denied LSC's motion for reconsideration and issued its

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benefits to which LSC directors are entitled, and not in a constitutional sense whereby they would be outside of the President's recess appointment power. (A21-A22).

final order and judgment, awarding Petitioner monetary damages for wrongful termination. (A36-A42).

Both Respondents appealed the district court judgment to the U.S. Court of Appeals for the District of Columbia Circuit. Reciting the chaotic history of recess appointments to its board of directors, LSC pointed out that the issue of when a "vacancy" arises under the LSC Act is extremely important to the organization's stability and effectiveness and should be definitively resolved by the court, but it took no position on the merits of that question before the court of appeals.[5] However, LSC argued that Petitioner should be denied relief under the *de facto* officer doctrine.[6] Strangely ignoring this Court's intervening (and seemingly dispositive) decision in *Ryder v. United States*, 115 S. Ct. 2031 (1995),

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[5] Court decisions are split on the effect of holdover provisions identical or similar to that in the LSC Act. Besides the district court decision in this case, *see Staebler v. Carter*, 464 F.Supp. 585 (D.D.C. 1979)(upholding recess appointments to the FEC); *McCalpin v. Dana*, No. 82-542 (D.D.C. Oct. 5, 1982)(upholding recess appointments to LSC board), *vacated as moot*, 766 F.2d 535 (D.C. Cir. 1985); and *Mackie v. Clinton*, 827 F.Supp. 56 (D.D.C. 1993) (invalidating recess appointments to U.S. Postal Service board).

[6] That defense by LSC had been rejected by the district court on the basis of *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 115 S. Ct. 537 (1994). (A37).

the court of appeals found LSC's *de facto* officer argument unpersuasive because, in its words:

> The notice requirement of the *de facto* officer doctrine is designed to permit the government agency to act so as to avoid a constitutional challenge. *See Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984). We cannot imagine how the Board could have altered its behavior to avoid Wilkinson's challenge —- other than to extend his contract. If the Board members were unconstitutionally appointed, there was obviously no means available to them to remedy that legal situation. (A5).

However, the court of appeals found a claim of constitutional estoppel to be "implicit" in LSC's invocation of the *de facto* officer doctrine.[7] (A5-A6). Seizing on this newly-identified issue, the court held that the doctrine of constitutional estoppel barred Petitioner from challenging the LSC board's composition. (A6). This conclusion was based on two factors: First, the court stated, Petitioner "was employed and *compensated* by a recess appointments Board for nearly two years." Second, his salary was increased by cost-of-living adjustments, and he "apparently" received enhanced insurance benefits, after the recess appointees took

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[7] Following the oral argument, the panel had directed the parties, in supplementary filings, "to address the relevance of our recent decision in *Robertson v. FEC*, 45 F.3d 486 (D.C. Cir. 1995), dealing with constitutional estoppel" — a matter previously unbriefed by any party. (A10).

over. *Id.* Because Petitioner received such "benefits" in connection with his employment while the recess appointees were in control of LSC, the court of appeals refused to hear his challenge to the validity of their appointments, citing *Robertson v. FEC, supra*, 45 F.3d at 490. As a result, the difficult and pressing issues of statutory construction and constitutional law presented in the district court decision and argued by the parties were not dealt with at all.[8]

On that basis, the court of appeals on April 9, 1996 reversed the judgment of the district court and remanded the case for consideration of the other claims asserted by Petitioner. (A7-A8).

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the D.C. Circuit, applying a broadened concept of "constitutional estoppel" which effectively restricts access to the courts, involves important issues of federal constitutional law and conflicts with decisions of this Court and other circuits. Petitioner is asking the Court to review and resolve only the constitutional estoppel issue — not the important substantive statutory and constitutional issues, which the court of appeals ducked by invoking the doctrine, and which it should be directed to decide on remand.

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[8] Petitioner also argued (and the Government did not dispute) that the directors failed to qualify by taking an oath to uphold the Constitution, *see* Art. VI, Cl. 3, or otherwise, but this point was ignored by the court of appeals.

1.

Constitutional estoppel is a judicially-conceived doctrine, which prevents those who have gained special benefits from a statutory scheme or program from unfairly evading the attendant duties and responsibilities by suing to challenge its constitutionality. Although "applied unevenly in the past" and often "observed...in the breach," the doctrine's purpose is to make sure a litigant cannot "retain the benefits of an Act while attacking the constitutionality of one of its important conditions." *Arnett v. Kennedy*, 416 U.S. 134, 153 (1974), *quoting United States v. San Francisco*, 310 U.S. 16, 29 (1940); *Fahey v. Malonee*, 332 U.S. 245, 256 (1947)(one using an Act "to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions"). But the circuit court in this case has stretched constitutional estoppel well beyond its recognized parameters and has ignored this Court's strong guidance as to its limitations.

First, passive or incidental receipt of benefits has not in past cases been sufficient to bar a litigant's right to challenge a statutory program or its administration. As the Court stated in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456-57 (1988), "we doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it." *See also Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 (1937)(Brandeis, J.), holding that "affirmative steps" must have been taken to obtain benefits under a statute before a plaintiff will be precluded from assailing its constitutionality; *accord, Spaulding v. Douglas Aircraft Co.*, 154 F.2d 419, 422 (9th Cir. 1946)(distinguishing estoppel cases where parties making

constitutional challenges to statutes "had acted *affirmatively* to procure a benefit from such statutes").[9]

Here, by contrast, Petitioner took no affirmative action to get special or unique benefits from the recess-appointed directors before challenging their authority. All he did was to continue working and receiving his salary under a pre-existing contract, and to become a passive recipient of two across-the-board COLA increases and insurance enhancements for all or most LSC employees. The benefits identified by the appeals court did not arise from any invocation by Petitioner of the challenged directors' authority, and they bore no meaningful relationship to the lack of legitimate title that Petitioner sought to raise in court. The holding that such benefits preclude Petitioner from disputing the LSC board members' authority creates new law and conflicts with the decisions of this Court in *Kadrmas* and *Thompson*.

The decision also conflicts with decisions of other federal courts considering constitutional estoppel claims, including the Eleventh Circuit in *S.J. Groves & Sons v. Fulton County*, 920 F.2d 752, 768-69 (11th Cir. 1991),

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[9] In *Robertson v. FEC*, the plaintiff affirmatively applied for and received over $10 million in matching funds from the agency, which he later sought to attack as unconstitutionally composed in order to avoid a partial repayment order. The court of appeals ignored this crucial distinction from Petitioner's case. Petitioner has no argument with the result in *Robertson*, which applied constitutional estoppel in the traditional manner articulated in *Arnett v. Kennedy*, but it does not govern this case.

following *Kadrmas;* the Seventh Circuit in *Brockert v. Skornika*, 711 F.2d 1376, 1380 (7th Cir. 1983), holding the doctrine inapplicable to a city employee who challenged the validity of a residency waiver procedure, although he had previously received and benefited from waivers; and the Ninth Circuit in *Spaulding v. Douglas Aircraft Co., supra,* refusing to apply the doctrine to bar a subcontractor's constitutional challenge to a renegotiation provision in a contract for parts that it supplied.

Second, application of constitutional estoppel in a particular case "must rest on substantial grounds of prejudice or change of position, not on technicalities." *Ashwander v. TVA*, 297 U.S. 288 (1936). The court of appeals in this case overlooked that important limitation on the doctrine, and there is no basis here for finding any prejudice to LSC or any change of position based on anything Petitioner did actively, or passively — which was to receive compensation for his services, and to accept two standard COLA increases which were added unilaterally to his existing salary by LSC. And any alleged tardiness on Petitioner's part in pointing out the defect in the directors' recess appointments (assuming that he actually knew or should have known of the problem earlier) was not prejudicial, as the court of appeals itself pointedly noted, because there was nothing the directors could have done to remedy that legal situation. (A5).

Third, the court of appeals decision failed to recognize that historically the estoppel doctrine has applied to constitutional attacks on the validity of statutes, *see Fahey v. Mallonee, supra,* 332 U.S. at 255-56, but ***not*** to challenges

to actions taken by government or private actors based on contravention of a statute. *See Ryan v. Merit Systems Protection Board*, 779 F.2d 669 (Fed. Cir. 1985), where the Federal Circuit rejected the government's attempt to invoke constitutional estoppel "where no one is attacking the constitutionality of anything." Petitioner likewise has not challenged the constitutionality of the LSC Act. To the contrary, he expressly invokes and relies on the statute, including the holdover provision of § 2996c(b) and the "not...officers" provision of § 2996c(c), which on its face would preclude Presidential authority to make unconfirmed recess appointments of board members.[10] Thus the court of appeals has turned constitutional estoppel upside down, by applying it against a plaintiff who is opposing, rather than mounting, a constitutional attack upon a statute.

2.

It is difficult to reconcile the court of appeals' expansive application of constitutional estoppel — blocking Petitioner's right to pursue a timely challenge to the authority of the LSC board appointees who terminated him — with this Court's unanimous decision last year in *Ryder v. United States*, 115 S. Ct. 2031 (1995), 132 L.Ed.2d 136.[11] In that

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[10] Ironically, only the Government — not Petitioner — raised a constitutional challenge to the LSC Act, contending that the "not ...officers" provision if applied literally is unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976).

[11] As noted above, the D.C. Circuit for unexplained reasons failed to mention *Ryder* at all, or even to note its existence.

case an enlisted member of the U.S. Coast Guard appealed his court martial drug conviction on grounds that two civilian judges on the intermediate appellate court, which affirmed the conviction, held their posts in violation of the Appointments Clause. The Court of Military Appeals agreed that the two judges' appointments were defective but accorded *de facto* validity to their action in deciding Ryder's case. This Court reversed, holding that the *de facto* officer doctrine could not deprive Ryder of his right to have his case heard by properly appointed officers. *Id.*

The decision of the appeals court in this case was consistent in one respect with *Ryder* — by rejecting LSC's *de facto* officer defense — but it missed the fundamental point: an aggrieved litigant who timely challenges an official's title to office has a ***right*** to have the matter resolved by the reviewing court and, if the challenge is upheld, to obtain suitable relief. As stated there,

> one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.

Ryder, 132 L.Ed.2d at 143. The D.C. Circuit's expansion of constitutional estoppel not only creates a "disincentive to raise Appointments Clause challenges" to questionable

appointments, it specifically prevents Petitioner from obtaining what *Ryder* said he was entitled to: "a decision on the merits of the question and whatever relief may be appropriate" in the event he prevails on the statutory and constitutional points.

Furthermore, the decision creates an impossible bind for agency employees and program beneficiaries who might some day have occasion to challenge the authority of senior executive or judicial officers to act. In order to preserve his right to dispute the recess appointments of the LSC directors, the decision suggests that Petitioner would have had to give back his paycheck, as soon as new appointees arrived on the scene, at peril of forfeiting the right to argue that their appointments were invalid and to guard against the possibility that they would some day decide to terminate him. Another possible unintended consequence of the decision may be to inspire early suits, in which standing and ripeness would surely be raised by the defendants, asserting challenges to government actions and programs. Such cases would not have to be brought if potential plaintiffs are able, without fear of being later barred, to see whether litigation is really necessary. The effect that the court of appeals has sought to accomplish through broadened constitutional estoppel is exactly what this Court said in *Ryder* could not be done under guise of the *de facto* officer doctrine.

3.

The decision of the court of appeals also contravenes its duty as an incident of the judicial power under Article III to decide actual cases and controversies. In the words of Chief

Justice Marshall, appropriately inscribed in stone in the halls of this Court, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Thus where a litigant presents a justiciable case or controversy arising under the Constitution or laws of the United States, and having satisfied standing and ripeness requirements, the duty of the judiciary is generally to render a decision — even if the issues are difficult. *See Ashwander*, 297 U.S. at 323 ("We think that the plaintiffs have made a sufficient showing to entitle them to bring suit and that a constitutional question is properly presented and ***should be decided***.") (emphasis added). Furthermore, the opportunity for an aggrieved citizen to raise constitutional and statutory challenges to government action in court is part of the right of petition guaranteed under the First Amendment, which should not be lightly disregarded. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920 (1993). There of course are exceptions (*e.g.*, cases involving a "political question" or discretionary functions of the executive, which implicate separation-of-powers concerns), but nothing of that nature is involved in this case. *See Boehner v. Anderson*, 30 F.3d 156, 160-61 (D.C. Cir. 1994)(abuse of court's equitable discretion not to hear Congressman's constitutional challenge to payment of COLA salary increase for members of Congress).

Petitioner was fired as the first Inspector General of LSC by people he contends had no right to act as members of its board of directors, because their appointments were

made in violation of federal law and without Constitutional authority, and because they did not take the oath of office or otherwise to qualify to serve. The courts must remain open to this kind of challenge by litigants in Petitioner's situation, and constitutional estoppel should not be erected as a barrier to the availability of judicial resolution and relief.

CONCLUSION

The effort by the court of appeals to avoid the issues of statutory construction and constitutional law involved in this case — through its erroneous and over-expansive application of constitutional estoppel in a manner contravening much of the teaching of this Court and others — should not be condoned. The Court accordingly should grant the writ of certiorari sought by Petitioner, reverse the judgment of the court of appeals, and remand the case for decision on the merits of the substantive issues raised by the parties.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 13, 1996 Decided April 9, 1996

No. 95-5144

DAVID L. WILKINSON, APPELLEE

v.

LEGAL SERVICES CORPORATION, APPELLANT

Consolidated with 95-5174

Appeals from the United States District Court
for the District of Columbia
(91cv0889)

Before: SILBERMAN, SENTELLE and ROGERS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: The Legal Services Corporation (LSC) appeals the district court's determination that David Wilkinson's discharge as Inspector General was illegal because the Corporation's Board was unconstitutionally composed. We reverse and remand.

I.

Wilkinson was employed under a written contract as the Inspector General of the LSC from September, 1989 to August, 1991, when the LSC Board of Directors exercised its contractual right not to renew his employment for the following year. The LSC Board that hired him was composed of directors appointed by President Reagan and

confirmed by the Senate. Although by 1989 their terms of office had expired, they continued to serve under a "holdover" provision in the Legal Services Corporation Act, 42 U.S.C. § 2996c(b) (1988), that allowed them to remain until successors were appointed and "qualified." At the end of 1989 and the beginning of 1990, President Bush replaced the Reagan "holdover" directors with recess appointments, *i.e.* appointments made while the Senate was in recess and not confirmed by the Senate. In 1991 President Bush again made recess appointments, most of whom were the LSC members he had earlier appointed.[1] Wilkinson served under Boards composed of recess appointees 19 of his 24 months as Inspector General.

Wilkinson sued LSC claiming that the Board lacked authority to "discharge" him because its members were appointed in violation of the Appointments Clause, U.S. CONST. art. II, § 2, cl.2, which requires officers of the United States to be confirmed by the Senate. He also alleged that the action of the Board in terminating his employment was in violation of LSC's by-laws and governing Act. Wilkinson sought transcripts pursuant to the Government in the Sunshine Act, 5 U.S.C. § 552b (1994), of the closed session at which the Board discussed his termination. The district court, on cross motions for summary judgment, held that the composition of the Board was unconstitutional and that Wilkinson was entitled to the transcripts. The claim that the Board's actions violated the LSC by-laws and Act was said to be moot given these rulings. Wilkinson was awarded $224,600 as compensation for lost salary and employment benefits incurred as the result of the illegal termination.

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[1]Incredibly, 75% of all presidential recess appointments between 1989 and 1992 were made to the LSC Board of Directors.

II.

Paradoxically, it is not the appellant that challenges the district court's constitutional ruling. Instead, it is the United States, as intervenor, who contends that the appointments were constitutional under the Recess Appointments Clause, which provides that the President has the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2, cl.3. A "vacancy" occurred, according to the United States, once a Board member's term of office expired even if that member continued to serve under the holdover provision. The holdover provision states that a member may continue to serve until a successor is "appointed and qualified." A recess appointee is "qualified" and, therefore, may replace a holdover member.

Wilkinson objects to the United States' reading of the Clause, noting that the LSC Act provides that "[t]he members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States," 42 U.S.C. § 2996c(c). This indicates that Congress did not intend for there to be a "vacancy" for purposes of the Recess Appointments Clause—which, after all, applies only to officers of the United States—when a member is serving under the holdover provision. Wilkinson also points to the legislative history of the LSC Act, arguing that Congress wished in that legislation to limit the President's Recess Appointments Clause powers. Naturally, the United States proposes an alternative reading of the legislative history and of § 2996c(c), limiting that provision to questions concerning whether LSC Board members are "officers" for statutory purposes.

The dispute over whether a "vacancy" exists when a member is serving under the holdover provision is of

far-reaching importance since there are approximately 60 federal entities with similar statutory schemes. There is almost no discussion of the President's Recess Appointments Clause powers at the time of the Constitutional Convention and scant case law since. Both sides rely primarily on three district court decisions which are split on the constitutionality of replacing holdover directors with recess appointees. *Compare Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979) (upholding the validity of recess appointments to the Board of Directors of the Federal Election Commission); *McCalpin v. Dana*, No. 82-542 (D.D.C. Oct. 5, 1982) (upholding the validity of recess appointments to LSC's Board), *vacated as moot, sub. nom McCalpin v. Durant*, 766 F.2d 535 (D.C. Cir. 1985), *with Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993) (invalidating recess appointment to the Board of Governors of the United States Postal Service), *vacated as moot*, 1994 WL 163761 (D.C. Cir. 1994). The LSC does not take a position on this dispute asking only that we decide this issue so the matter is settled once and for all.

LSC does argue that, regardless of the validity of the appointment of particular directors under the Recess Appointments Clause, the Board's actions are valid under the *de facto* officer doctrine. The Supreme Court has described the general rule, which is embodied by this doctrine, as providing that:

> where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public.

McDowell v. United States, 159 U.S. 596, 602 (1895). The district court, relying on our recent opinion in *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 115 S. Ct. 537 (1994), rejected application of the *de facto* officer doctrine.

In that case, we held that since the Federal Election Commission was unconstitutionally constituted, its enforcement action against the NRA had to be dismissed. Appellant contends that *NRA* (and *Northern Pipeline Constr. Co. v. Marathon Pipe line Co.*, 458 U.S. 50 (1982), on which *NRA* relies) is distinguishable because the NRA, an independent actor, had challenged the constitutionality of an agency seeking to take action against it. *Cf. Morrison v. Olson*, 487 U.S. 654, 669-70 (1988). Here, it is argued that Wilkinson, an employee of the Corporation—indeed its Inspector General—had an obligation to notify the Board of the alleged constitutional defect long prior to his suit. We are unpersuaded by this argument. The notice requirement of the *de facto* officer doctrine is designed to permit the government agency to act so as to avoid a constitutional challenge. *See Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984). We cannot imagine how the Board could have altered its behavior to avoid Wilkinson's challenge—other than to extend his contract. If the Board members were unconstitutionally appointed, there was obviously no means available to them to remedy that legal situation.

We recognized, however, that appellant's *de facto* officer argument is phrased in equitable estoppel terms—that Wilkinson should not be heard to complain about an "alleged title defect [of the Board members legal title] which he utterly failed to bring to the attention of the Board or LSC during his tenure as Inspector General...." That led us to ask the parties to address the relevance of our recent decision in *Robertson v. FEC*, 45 F.3d 486 (D.C. Cir. 1995), dealing with constitutional estoppel. Appellant, not surprisingly, embraced that opinion and assimilated it into its argument; Wilkinson —- again not surprisingly -— claimed that appellant's argument, both in the district court and before us, did not extend to the constitutional estoppel principle set forth in *Robertson* and that therefore that "argument" was waived.

As we have already noted, we think an estoppel argument was implicit in the manner in which appellant presented its *de facto* officer doctrine argument in its brief. Moreover, constitutional estoppel is just one application of the estoppel concept, a branch of equity. And, appellant did rely on general equitable principles to urge reversal. It did the same thing below —- at least in its motion for reconsideration. The district court rejected those arguments on the merits, not because the court thought they had been waived. Therefore, the claim that Wilkinson is estopped from challenging the constitutionality of the Board members' appointments is properly before us.

III.

We think that the *Robertson* estoppel doctrine does bar Wilkinson from challenging the constitutionality of the Board's composition. *Robertson* involved a presidential candidate, Pat Robertson, who accepted federal matching funds from the FEC, but when the FEC required him to repay some of these funds due to various improprieties, he refused to do so. Robertson claimed that the FEC was unconstitutionally constituted under *NRA*, thereby rendering the FEC powerless to require repayment. We rejected this argument explaining that

> [i]t is hardly open to [Robertson] now, after having taken the money, to claim that the very statutory instrumentality by which the funds are dispensed may not seek reimbursement because its composition is unconstitutional.... [Robertson] has mounted a categorical, structural challenge unrelated to the funds he has received and now attempts to avoid repaying.

Robertson, 45 F.3d at 490. Similarly, Wilkinson has been employed and *compensated* by a recess appointments Board

for nearly two years. What is more, this Board, as documented by the transcripts of its meetings, allocated funds for the 1990 and 1991 cost-of- living adjustments beyond those to which Wilkinson was entitled to by contract.[2] Wilkinson attempts to distinguish *Robertson* because the Board that hired him was undoubtedly legally appointed; he only challenges the actions of the allegedly illegally constituted Board that terminated his employment. But Wilkinson would have us ignore the fact that he was employed and compensated for much of the time by the same allegedly illegal Board. If the Board were unconstitutionally constituted, it might be that all payments made to Wilkinson are voidable. It is not at all clear to us that Wilkinson even has standing to raise his constitutional claim. For if the Board were unconstitutionally appointed, a decision to extend his contract for another year (and therefore not to give him notice of termination) would seem as much beyond the Board's authority as its decision to terminate the contract. Wilkinson's standing to raise this issue may depend on a close reading of his contract, but since by relying on constitutional estoppel we do not reach the merits, we think it unnecessary to explore that question further.

The district court did not consider Wilkinson's alternative claim that the termination of his employment violated the LSC by-laws and Act, so we remand this question.[3] This claim is not a categorical, structural challenge to all the recess appointments Board's actions but

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[2]It also appears that Wilkinson received additional insurance benefits.

[3]The district court's conclusion that the Board violated the Sunshine Act by holding closed meetings is not before us since LSC only challenges this conclusion if we decide that the recess appointments Board was unconstitutionally constituted.

rather directly focuses on the legality of the specific action which resulted in Wilkinson's termination.

* * * *

Accordingly, the constitutional issue that all parties wish us to decide will have to remain for another case that necessarily presents that issue. The district court's decision in favor of appellee Wilkinson is

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5144 September Term, 1995

David L. Wilkinson,
Appellee

v.

FILED
APR - 9 1995

Legal Services Corporation,
Appellant

Consolidated with 95-5174

Appeals from the United States District Court
for the District of Columbia
(91cv0889)

Before: SILBERMAN, SENTELLE and ROGERS, *Circuit Judges.*

JUDGMENT

These causes came on the be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in these causes is hereby reversed and the cases are remanded in accordance with the Opinion of the Court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

Date: April 9, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5144
(91CV00889)

September Term, 1995
Argued: 2-13-96

David L. Wilkinson

v.

FILED
FEB 13 1995
Clerk

Legal Services Corporation,
Appellant

United States of America

And Consolidated Case No. 95-5174

Before: SILBERMAN, SENTELLE and ROGERS, *Circuit Judges*.

ORDER

It is **ORDERED**, by the Court, on its own motion, that the parties are directed to respond, in not more than 10 pages, by Friday, February 23, 1996, to (1) Judge Sentelle's question concerning the text of the oath, if any, taken by the Directors of the Corporation, and (2) the equitable estoppel argument implied in the Corporation's brief. In this connection, the parties should indicate the applicability, if any, of *Robertson v. FEC*, 45 F.3d 486, 489-90 (D.C. Cir. 1995).

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 21 1994

DAVID L. WILKINSON,	)	
	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 91-0889 (JHG)
	)	
LEGAL SERVICES CORPORATION,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, David L. Wilkinson ("Wilkinson"), filed a three-count second amended complaint in this action against defendant, Legal Services Corporation ("LSC"), pursuant to the Government in the Sunshine Act ("Sunshine Act"), codified at 5 U.S.C. § 552b, the United States Constitution, and the by-laws of the LSC. Presently pending are the parties' cross-motions for summary judgment and the motion of intervenor-defendant, the United States of America ("United States" or "Government"), for summary judgment as to Count Two. For the reasons expressed below, plaintiff's motions are granted as to Counts I and II, defendant's motions are denied as to Counts I and II, intervenor-defendant's motion as to Count II is denied, and Count III is mooted by the actions taken herein.

I. Background

The facts are basically not in dispute. The LSC is a private, non-profit, tax-exempt corporation established by the

Legal Services Corporation Act of 1974 ("LSC Act"), codified at 42 U.S.C. § 2996b. It provides financial support for legal assistance in certain non-criminal proceedings to persons throughout the United States who cannot otherwise afford legal assistance. The LSC Act provides that the LSC is subject to the provisions of the Sunshine Act, *see* 42 U.S.C. § 2996c(g), and, with slight modification, the LSC is subject to the procedural regulations of the Sunshine Act, codified at 45 C.F.R. §§ 1622.1-1622.10.

Plaintiff began serving as the Inspector General ("IG") of the LSC on September 5, 1989, pursuant to the Inspector General Act of 1978, codified at 5 U.S.C. § 8E. The written employment agreement between Wilkinson and the LSC provides for an initial two-year term of office, which would be automatically extended from year to year unless either party gave notice of an intent not to extend by March 5 of the final year of the contract.

As IG, Wilkinson reported directly to the eleven member Board of Directors ("Board") that governs the LSC. The members of the Board, who are appointed by the President of the United States with the advice and consent of the Senate, serve a specific term of years, but the LSC Act states that each member of the Board shall continue to serve until a successor to the member is appointed and confirmed. *See* 42 U.S.C. § 2996c(b). Further, the by-laws of the LSC require each member of the Board to execute a "willingness to serve statement," which avows that they will discharge the required duties faithfully. One of these required duties is to elect the President of the LSC, who serves as chief executive officer subject to the Board's supervision,

On October 1, 1990, David H. Martin ("Martin") began his term as President of the LSC. Plaintiff alleges that from October 1990 to "at least" January 1991, Martin "assumed and exercised total power and control over

management of the [LSC], on the asserted basis that there were no qualified members of the Board of Directors to whom he was required to report during that period." Second Amended Complaint ¶ 4A. Wilkinson further alleges that Martin "conceived and initiated a scheme to get rid of other senior officials and employees of the [LSC], including the Vice President and General Counsel, the Secretary...and the Inspector General, and to hire personal friends in responsible positions at the [LSC]." *Id.*

On January 2, 1991, the President of the United States announced eleven recess nominations to the Board.[1] The eleven individuals were formally nominated on February 7, 1991, but were never confirmed by the Senate. Further, none of the eleven individuals signed a "willingness to serve" statement before February 22, 1991.

Prior to February 22, 1991, the Board retained outside counsel to advise it of its rights under Wilkinson's employment contract. By letter dated February 25, 1991, the LSC notified Wilkinson that his employment contract would not be extended beyond September 5 of that year. Subsequently, on March 25, the Board convened an executive session to meet with the outside counsel and discuss the matter of plaintiff's employment contract.

The second amended complaint has three counts. Count I alleges that the Board conducted meetings in private in violation of the Sunshine Act and the by-laws of the LSC, both of which require open meetings. Specifically, this count alleges that on January 28, 1991, February 22, 1991 and

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[1]As explained more fully infra, the Recess Appointments Clause grants the President the "Power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. Art. II, § 2, cl. 3.

March 25, 1991, portions of the Board meetings were unlawfully closed to the public. Count II alleges that the members of the Board given recess appointments by the President on January 2, 1991 and formally nominated on February 7, 1991 did not have the power to act as Directors. In this count, plaintiff alleges that the Recess Appointments Clause does not apply to the LSC and that the Directors were never confirmed by the Senate. In Count III, plaintiff claims that the termination of his employment on September 6, 1991 was in violation of the by-laws of the LSC and the LSC Act.

II. Discussion

The parties have each moved for summary judgment on all three counts. In addition, the United States has intervened as a defendant in this action and filed a motion for summary judgment as to Count II. Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is a need for trial - whether, in other words, there are any genuine issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. At the same time, however, Rule 56 places a burden on the nonmoving party to "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

A. The Sunshine Act

In Count I, plaintiff raises a number of procedural challenges to the closing of portions of the January 28, 1991, February 22, 1991 and March 25, 1991 meetings of the Board. Specifically, plaintiff alleges that: (1) there was no adequate or meaningful public notice of closure; (2) the votes used to close the meetings were done in violation of the by-laws; (3) the public explanations for the closed meetings were inadequate; (4) the general counsel was not given an opportunity to determine if the meetings were lawfully closed; (5) the transcripts of the meetings were not made open to the public or properly maintained; and (6) the LSC did not keep attendance records of the meetings. Defendant denies each of these alleged procedural irregularities and further claims that the questioned meetings were properly closed pursuant to Exemptions 2, 9(B) and 10 of the Sunshine Act and the attorney-client privilege.[2]

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[2]Defendant originally relied on Exemption 6 as well, but has apparently withdrawn that reliance. In any event, Exemption 6, which exempts "information of a personal nature", does not apply when such discussions involve a high level employee such as Mr. Wilkinson. See Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 938 (D.C. Cir. 1982).

Defendant also originally argued that plaintiff's claims regarding the January 28, 1991 Board meeting were untimely because the Sunshine Act requires all claims to be brought within 60 days of the alleged violation. 5 U.S.C. § 552b(h)(1); see Defendant Legal Services Corporation's Memorandum of Points and Authorities in Support of its Motion for Summary Judgment [on Count I] at 14. The LSC has apparently withdrawn this argument in light of the tolling provision of § 552b(h)(1), which provides that "if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this [Act], such action may be instituted . . . at

(continued...)

Resolution of this count necessarily proceeds in two phases. First, it must be determined whether the claimed Sunshine Act exemptions or the attorney-client privilege apply to the questioned meetings. If any one of these justifications for public closure apply, then the procedural challenges must be evaluated.

As stated above, defendant claims that the subject meetings were properly closed to the public pursuant to Exemptions 2, 9(B) and 10 of the Sunshine Act. These claims must be analyzed in light of the policy of the Sunshine Act, which is that "the government should conduct the public's business in public." *Common Cause v. Nuclear Regulatory Comm'n*, 674 F.2d 921, 928 (D.C. Cir. 1982) (citation omitted); *see Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 798 F.2d 499, 501 (D.C. Cir. 1986) (en banc); Government in the sunshine Act, ch. 409, 90 Stat. 1241 (1976) (declaring as the policy of the sunshine Act that "the public is entitled to the fullest practicable information regarding the decisionmaking process of the Federal Government"). Toward this end, the Sunshine Act requires that every meeting of a federal agency be open to the public, although portions of a meeting may be closed if the discussions are "reasonably likely" to fall within one of the ten enumerated exemptions. *Common Cause*, 674 F.2d at 928; *Philadelphia Newspapers, Inc. v. Nuclear Regulatory Comm'n*, 727 F.2d 1195 (D.C. Cir. 1984). The exemptions, however, are to be narrowly interpreted and the agency bears the burden of proof on any claimed exemption. *Common Cause*, 674 F.2d at 928.

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[2](...continued)
any time prior to sixty days after public announcement of such meeting." See Reply Memorandum of Defendant Legal Services Corporation in Support of its Motion for Summary Judgment on Count I and Opposition Memorandum to Plaintiff's Cross-Motion for Summary Judgment on Count I.

The first Sunshine Act exemption upon which defendant relies is Exemption 2, Exemption 2 permits an agency to close any meeting or any portion thereof at which information that "relate[s] solely to the internal personnel rules and practices of an agency" will be discussed. 5 U.S.C. § 552b(c)(2). Defendant claims that because any discussion regarding Wilkinson's position at the LSC is a "strictly internal matter," it falls within the purview of Exemption 2. Defendant Legal Service Corporation's Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Defendant's Mem.") at 19-20 (quoting H.R. Rep. No. 94-880 (Part I), 94th Cong., 1st Sess. 9 (1976)).

There is a dearth of case law interpreting Exemption 2 of the Sunshine Act. In *Common Cause*, however, our Court of Appeals noted that the language of Exemption 2 to the Sunshine Act "is virtually identical with that in Exemption 2 to the Freedom of Information Act" ("FOIA"). 674 F.2d at 937. That court further recognized that the "conference report on the Sunshine Act expressly adopts the standards of *Dep't of Air Force v. Rose*,...the leading Supreme Court decision interpreting Exemption 2 of FOIA." *Id.* In *Department of Air Force*, the Supreme Court, relying on the Senate Report to FOIA, interpreted Exemption 2 to include only "minor or trivial matters" and not "those more substantial matters which might be the subject of legitimate public interest." 425 U.S. 352, 365 (1976). Because any discussion of the employment status of high ranking officials at the LSC is not a "minor or trivial matter," Exemption 2 does not permit closure of any of the LSC meetings at issue.

The next exemption upon which the LSC relies is Exemption 9(B), which permits closure if the discussion at the meeting would "disclose information the premature disclosure of which would. . . be likely to significantly frustrate implementation of a proposed agency action." 5

U.S.C. § 552b(c)(9). Defendant asserts that this exemption applies because the Board discussed its assessment of plaintiff's bargaining position at the meetings, and public disclosure of this position would operate to the detriment of the LSC. Defendant's Reply at 7.

Although this exemption is difficult to interpret and, perhaps, more perplexing to apply, the LSC has not met its burden of justifying closure pursuant to Exemption 9(B). An analysis of this exemption must be mindful that the principle of narrow construction applies "with particular force to this exemption." *Common Cause*, 674 F.2d at 932. This is primarily because Congress deliberately excluded an exemption comparable to FOIA Exemption 5 (predecisional deliberations) from the Sunshine Act, and courts must be wary not to permit Exemption 9 to be used as a *de facto* equivalent of FOIA Exemption 5. *Id.* An Exemption 9(B) claim, therefore, is properly analyzed in reference to the four concrete examples of the application of this exemption in the House and Senate Reports. The examples referenced in the House and Senate Reports are (1) an agency considering an embargo on foreign shipments of certain goods; (2) an agency discussing whether to approve a proposed merger; (3) an agency proposing its strategy for an upcoming collective bargaining with its employees; and (4) an agency contemplating a purchase of real property. *See Common Cause*, 674 F.2d at 933. The common thread in these examples is that disclosure of the agency's proposals or bargaining position "could affect private decisions by parties other than those who manage the federal government," and the "private responses of such persons might damage the regulatory or financial interests of the government as a whole." *Id.* Any discussion of Mr. Wilkinson's employment status is much more akin to unprotected "predecisional deliberations" than to the actions protected by Exemption 9(B).

The final exemption upon which the LSC relies is Exemption 10. This exemption permits an agency to close a meeting if the discussion will address, *inter alia*, "the agency's participation in a civil action or proceeding". 5 U.S.C. § 552b(c)(10). There is no requirement that litigation be pending, provided adversarial proceedings are imminent. *See Clark-Cowlitz Joint Operating Agency*, 798 F.2d at 499. Defendant claims that "[l]arge portions of the January 28, 1991, February 22, 1991, and March 25, 1991 executive sessions were devoted to presentations by LSC's chief legal officer concerning LSC's involvement in pending litigation." Defendant's Reply at 8-9. Plaintiff does not dispute this assertion, insofar as LSC's counsel discussed then-pending or imminent litigation matters with the Directors. Plaintiff's Reply at 4. The LSC, however, has given no indication that any discussion regarding Wilkinson's employment status and any potential litigation spawned therefrom occurred at the meetings. Accordingly, Exemption 10 does not apply.[3]

Finally, LSC claims that the attorney-client privilege shields disclosure of the meeting transcripts. This claim cannot be sustained. Congress did not include in the Sunshine Act an exemption similar to FOIA's Exemption 5 for predecisional memoranda, which the Supreme Court has held to incorporate the attorney-client privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975). To permit the LSC to hide behind the shield of the attorney-client privilege would be an impermissible inclusion of FOIA Exemption 5 into the Sunshine Act or an unjustified extension of Exemption 10. *See Clark-Cowlitz Joint*

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[3]Nonetheless, plaintiff is not asking for, and is not entitled to, all of the transcripts from the meetings in question. He properly recognizes that Exemption 10 protects those portions of the transcripts in question at which LSC's counsel discussed then-pending or imminent litigation matters with the Directors.

Operating Agency, 798 F.2d at 505 (Wright and Mikva, JJ., dissenting). Accordingly, because the meetings were improperly closed, summary judgment will be granted for plaintiff on Count I.[4]

B. The Recess Appointments Clause

In Count II, plaintiff claims that he was improperly terminated because the Directors who approved his termination were not properly in office. Wilkinson claims that the Recess Appointments Clause, pursuant to which all ten Directors who approved his termination were appointed[5], does not apply to the LSC and that, therefore, those Directors did not have the power to approve his termination.

The Appointments Clause of the United States Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States . . . ." U.S. Const. Art. II, § 2, cl. 2. The drafters recognized that an appointment might be necessary at a time when advice and consent of the Senate would not be possible due to a congressional recess.[6] The succeeding clause provided for

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[4]This disposition renders moot plaintiff's claim that the LSC did not properly follow sunshine Act procedures in closing the meetings.

[5]One of the directors recused himself from consideration of Wilkinson's employment status.

[6]This was more of a concern in the early days of our government when Congress was in session for only several months of the year. In fact, for "the first 49 Congresses, from 1789 to 1887, Congress spent more days in recess than it did in session." Stuart J. Chanen, Comment, *Constitutional Restrictions on the*

(continued...)

this contingency by granting the President the "Power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. Art. II, § 2, cl. 3. This latter clause has become known as the Recess Appointments Clause.

These Article II, Section 2 provisions are not easily applied to the LSC Act. The LSC Act provides that the eleven voting members of the LSC Board shall be "appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. § 2996c(a). This language appears specifically to reference the Appointments Clause, along with the complementary Recess Appointments Clause. Indeed, were this the sole provision of the LSC Act regarding membership on the Board, resolution of this claim would be relatively ministerial.

Two subsequent provisions of the LSC Act complicate this determination. First, the LSC Act provides that the "members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States." 42 U.S.C. § 2996c(c). Plaintiff argues that this subsection removes the Board from the province of the Appointments Clause, which, by its own terms, applies only to "Officers of the United States." U.S. Const. Art. II. § 2, cl. 2.

This argument, despite its facial appeal, can be easily dismissed. The term "Officers of the United States" has constitutional significance in the Appointments Clause. *Id.*

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[6](...continued)
President's Power to Make Recess Appointments, 79 Nw. U. L. Rev. 191, 196 n.30 (1984) [hereinafter *Recess Appointments*] (citing Office of the Secretary of the Senate, Presidential Vetoes, 1789-1976 at x-xx (1978) (dates of sessions of Congress)).

In contrast, there is no corresponding constitutional meaning to the term "employees" of the United States, and it is unlikely that Congress intended the word "officers" to be used in the constitutional sense when the word "employees" in the same phrase has no constitutional meaning. It is much more likely that 42 U.S.C. § 2996c(c) merely uses "officers" in the statutory sense, to limit the statutory benefits — as opposed to the constitutional rights — to which the members of the Board are entitled. *See Dana v. McCalpin*, No. 82-542 (D.D.C. Oct. 5, 1982), *vacated as moot*, 766 F.2d 575 (D.C. Cir. 1985); *cf. National Treasury Employees Union v. Reagan*, 663 F.2d 239, 246 (D.C. Cir. 1981).

A second provision of the LSC Act presents a problem that cannot be so easily resolved. The LSC Act limits the term of office for the Board members to three years, but then provides that "Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified." 42 U.S.C. § 2996c(b). Plaintiff argues that this "holdover" provision prevents a recess appointment because the Recess Appointments Clause, by its own terms, depends upon the existence of "vacancies" and there are no "vacancies" on the LSC Board because the holdover Director rightfully occupies that position.[7] The Court, therefore, must determine whether the expiration of a statutory term of

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[7]This argument accompanies plaintiff's argument that a recess appointment constitutes a "removal" of a sitting director in violation of 42 U.S.C. § 2996c(e), which provides that "A member of the Board may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for no other cause." Memorandum in Support of Plaintiff's Motion for Summary Judgment on Counts Two and Three at 3-5. Although interesting, it is unnecessary to decide whether plaintiff would have standing to challenge the removal of Directors.

office for an LSC Director creates a "vacancy" to trigger application of the Recess Appointments Clause.

This determination properly begins with an examination of the constitutional text and history. If it is clear that the Framers intended the Recess Appointments Clause to provide the President sweeping appointment authority, then the LSC Act would be reviewed in this light. On the other hand, if the Framers intended the Recess Appointments Clause to be an emergency provision, the LSC Act would be evaluated accordingly.

It is difficult to ascertain the Framers' true intention in drafting the Recess Appointments Clause. There was little discussion and no debate on this provision at the Constitutional Convention. *See* 2 M. Farrand, *Records of the Federal Convention of 1787* (rev. ed. 1966), at 533, 540, 574, 600 (cited in *Staebler v. Carter*, 464 F. Supp. 585, 596 (D.D.C. 1979)). The only references to this Clause are Alexander Hamilton's comments that it should be used for "temporary appointments" when "it might be necessary for the public service to fill [a vacancy] without delay" and that it was intended as a "supplement" to the Appointments Clause. *Staebler*, 464 F. Supp. at 596, 596 n.26 (quoting *The Federalist No. 67* (Wesleyan ed. 1961) at 455).

The give-and-take between early Presidents and Congresses reveals the historic tension between the legislature and the executive over the power to make recess appointments.[8] To illustrate, it appears that President Washington sought and obtained Congress' permission before

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[8]In fact, the issues of whether the vacancy has to "occur" during a congressional recess or whether it simply has to "exist" during a recess and what constitutes a "recess" for purposes of the Recess Appointments Clause have never been resolved. Neither of these issues is before this Court today.

making recess appointments. *See* J. Harris, *The Advice and Consent of the Senate* 256 (1968) (cited in *Recess Appointments, supra,* at 197). This practice was not followed by subsequent Presidents, such as John Quincy Adams, Andrew Jackson and James Madison, frequently over congressional protestation. *See Recess Appointments, supra,* at 197-200.[9]

The tension ultimately spawned the Army Appropriation Act of 1863[10], which was reenacted as part of the Tenure of Office Act in 1867.[11] *Id.* at 201-02. The Tenure of Office Act entitled all civil government employees "to hold such office until a successor shall have been in like manner [by and with the advice and consent of the Senate] appointed and qualified." 14 Stat. 430 (1867).

Although the Tenure of Office Act was ultimately repealed, it was the precursor of numerous federal "holdover" provisions. In fact, there may be as many as sixty such provisions in the current United States Code. *See, e.g.*, 5 U.S.C. § 1202(b) (Merit Systems Protection Board

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[9]Early historical practice can provide evidence of the intent of the Framers, but the evidence here is insufficient to draw any firm conclusions. *See Stuart v. Laird*, 5 U.S. (1 Cranch) 299 constitutional issue "at rest"); *see also* Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758 (1984).

[10]12 Stat. 646 (1863), currently codified at 5 U.S.C. § 5503 (1982). With certain limitations, this Act prohibits payment of money from the Treasury to recess appointees when the vacancy to which they were appointed existed while Congress was in session.

[11]14 Stat. 430, *repealed by* 24 Stat. 400 (1887).

member "may continue to serve until a successor has been appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section"); 19 U.S.C. § 1330(b) (member of the International Trade Commission "may continue to serve . . . until his successor is appointed and qualified"); 16 U.S.C. § 792 (member of the Federal Power Commission "shall be appointed . . . until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress"); 49 U.S.C. § 10301 (Interstate Commerce Commission member "may continue to serve until a successor is appointed and qualified"); 15 U.S.C. § 41 (Federal Trade Commission member "upon the expiration of his term of office . . . shall continue to serve until his successor shall have been appointed and shall have qualified"); 15 U.S.C. § 78d(a) (member of the Securities and Exchange Commission "shall hold office . . . until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress").

Despite these numerous holdover provisions, there have been few judicial challenges in this context. The first challenge in the federal courts occurred in *Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979). In *Staebler*, Judge Harold Greene rejected the identical argument made in the instant case in the context of the Federal Election Campaign Act ("FEC Act"). Judge Greene first observed that plaintiff's argument was somewhat "circular" and stated that:

> If that be the correct analysis, the creation of a vacancy and its extinction by the appointment of a successor always and inevitably occur at the same instant and by the same act (i.e., an affirmative vote on a nomination by the Senate). While in theory it is not impossible for the

> Congress to have devised this kind of a circular scheme, it certainly constitutes a somewhat implausible method for organizing governmental operations and for that reason should not be attributed to Congress in the absence of persuasive evidence that this is what was intended.

464 F. Supp. at 589.

Beginning with this presumption that the recess appointments were valid, the Court then examined the language of the statute[12], its legislative history and several canons of construction. It concluded that a vacancy occurred on the Federal Election Commission upon expiration of a term of office, notwithstanding the holdover provision in the FEC Act.

First, the FEC Act mandates "that a 'vacancy occurring other than by expiration of a term of office' shall be filled only for the remainder of the unexpired term." 464 F. Supp. at 590. By implication, the court ruled, this language proved that a vacancy *must* occur at the expiration of a term of

---

[12]The Federal Election Campaign Act provides, in relevant part:

> (B) A member of the [Federal Election] Commission may serve on the Commission after the expiration of his term until his successor has taken office as a member of the Commission.
>
> (C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the expired term of the member he succeeds.

2 U.S.C. § 437c(a)(2).

office. *Id.* Second, the court was disturbed by the absence of any discussion on this issue in the legislative history:

> The Court finds it difficult to believe that, had the Congress intended to take the significant step of attempting to curtail the President's constitutional recess appointment power, or even to legislate in the area of that power, it would not have considered the matter with more deliberation or failed to declare its purpose with greater directness and precision. No such deliberation or direction can be found in this legislative history.

464 F. Supp. at 592. Next, Judge Greene noted that holdover provisions had been interpreted by various Presidents since 1915 not to conflict with the Recess Appointments Clause and Congress has never objected to this practice. *Id.* at 594. Finally, the court stated that interpreting the statute to reduce the President's ability to make recess appointments would be of questionable constitutional validity and should be rejected if this can be fairly done. *Id.* at 596.

Although *Staebler* was decided in the context of the FEC Act, its broad wording could apply to recess appointments in general. In fact, Judge Norma Johnson relied exclusively on *Staebler* to conclude summarily that this issue "requires little discussion" in the context of the LSC in *McCalpin v. Dana*, No. 82-542 (D.D.C. 1982), Slip Op. at 20, *vacated as moot, McCalpin v. Durant*, 766 F.2d 535 (D.C. Cir. 1985).

This issue was revisited by the District Court in *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993). In *Mackie*, Judge Louis Oberdorfer held that the holdover provision for

the Board of Governors of the United States Postal Service[13] prevented the creation of a "vacancy" sufficient to permit an appointment pursuant to the Recess Appointments Clause. Relying primarily on the statutory language, Judge Oberdorfer reasoned that, due to the holdover language, the outgoing Governor held the office "unless he dies, resigns, is lawfully removed or some 'successor has qualified,' i.e., has been nominated by the President and confirmed by the Senate." 827 F. Supp. at 58 (footnotes omitted). The court then considered the purpose of the Recess Appointments Clause, which it determined was "to prevent disruptions in the functioning of the government occasioned by periods in which the Senate is unable to perform its role of advice and consent." *Id.* at 58 (citing 41 Op. Atty. Gen. 463, 467 (1960); 33 Op. Atty. Gen. 20, 21-23 (1921)). Such disruptions do not exist if a holdover is in office.

History and precedent, therefore, do not provide for easy resolution of this case. The Recess Appointments Clause has been viewed by some as an emergency measure and by others as a prerogative of the executive. Moreover, federal cases analyzing the issue have reached irreconcilable conclusions. Faced with this lack of guidance, the Court must resort to the most basic tenet of statutory construction: the language of the statute itself. *See Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) ("in interpreting a statute a court should always turn first to one, cardinal canon before others. . . . [C]ourts must presume that a

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[13]The relevant statutory provision provides:

> The terms of the 9 Governors shall be 9 years. . . . A Governor may continue to serve after the expiration of his term until his successor has qualified, but not to exceed one year.

39 U.S.C. § 202(b).

legislature says in a statute what it means and means in a statute what it says there").

The language of the LSC Act is quite telling. Unlike the holdover provisions in *Staebler* and *Mackie*, which are written in the permissive, the holdover provision in the LSC Act is mandatory: "Each member of the Board *shall* continue to serve until the successor to such member has been appointed and qualified." 42 U.S.C. § 2996c(b) (emphasis added). The plain meaning of this language is that each member of the Board remains as a Director after that person's term has expired until the new Director has been "appointed" by the President and "qualified," i.e., confirmed by the Senate. The expiration of a statutory term of office, therefore, does not create a "vacancy" that requires application of the Recess Appointments Clause.

The plain meaning finds support in the purpose of the LSC Act. One of the congressional findings in the LSC Act is that "to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures." 42 U.S.C. § 2996. Consistent use of the recess appointments power thwarts this goal. Hand-picked recess appointees are undeniably accountable to the President. These Directors can be replaced at the next congressional recess at the whim of the President and can, therefore, be subject to political pressures and used for political purposes.[14] If recess appointments are not

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[14]In fact, plaintiff asserts, and neither the government nor the LSC refute, that seven recess directors served three consecutive recess appointments, the equivalent of a full term as a director, and one recess director served four consecutive recess terms. Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment on Counts II and III at 2. This is precisely the scenario recognized, but not decided, by the Court of Appeals in *McCalpin*.

(continued...)

permitted, the President will be forced to nominate Directors who will meet congressional approval. These Directors, in turn, will be able to serve three-year terms relatively free from political influence.

Further, there are several notable omissions from the LSC Act. First, there is no additional language, as in *Staebler*, to assist in defining the term "vacancy." The FEC Act discusses a "vacancy occurring *other than by expiration of a term of office*." 464 F. Supp. at 590 (emphasis added). The comparable language in the LSC Act, in contrast, provides that "Any member appointed to fill a vacancy occurring prior to the expiration of the term for which such member's predecessor was appointed shall be appointed for the remainder of such term." 42 U.S.C. § 2996c(b). The plain implication of the language in the FEC Act is that a vacancy occurs at the expiration of a term of office; the same is not true for the LSC Act provision, which could be read to mean that a vacancy occurs some time after the expiration of a term of office (i.e., by the resignation or removal of a holdover Director) as easily as it could be read to mean that a vacancy occurs at the end of a term of office.

Second, the LSC Act neither limits the length of time a holdover may remain in office nor limits the length of time a position may remain occupied by successive recess appointees. *Compare* 42 U.S.C. § 2996 (no limit to term of holdover) *with* 39 U.S.C. § 202(b) (term of a holdover "not to exceed one year"). Accordingly, if Congress, for whatever reason, never confirms any new Directors, it is possible that the entire Board could be comprised of holdover

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[14](...continued)
That court left for another day a determination of "the significance for our constitutional order of recess appointments that linger beyond brief terms." 766 F.2d at 538.

Directors. In contrast, under the approach advocated by the Government and the LSC, the President could continually appoint recess appointees who are, for whatever reason, never confirmed and the entire Board is ultimately comprised entirely of recess appointees.[15] Neither of these scenarios is, by any means, desirable. Nonetheless, it is preferable to have a board comprised entirely of holdover directors because a holdover director has, at least at some point in time and albeit possibly by a different President and Senate, received a Presidential appointment and Senate confirmation.

Despite this seemingly clear statutory language, it may be useful to examine the legislative history of the LSC Act for any indication of legislative intent. The legislative history reveals that the selection of Directors was a subject of intense struggle. Legislation introduced initially on behalf of President Nixon, H.R. 8163, proposed an eleven-member Board of Directors, appointed by the President with the advice and consent of the Senate, who were removable only by a vote of the members of the Board for specified causes. Congress resisted, and a compromise bill, H.R. 10351, which contained the provisions ultimately passed by both

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[15]Even the government concedes that this is more than merely a hypothetical, academic exercise. United States Opp. at 16 n.9. The LSC has been headed almost exclusively by recess appointees since 1980. Five of the Directors' terms expired on July 13, 1980 and the remaining six expired on July 13, 1981. *McCalpin*, 766 F.2d at 536. New nominees were not confirmed until June 12, 1985. *Id.* at 536-37. Moreover, no new directors were confirmed until fall 1993. Between 1981 and 1993, therefore, only 11 of the 64 people who served as Directors of the LSC were confirmed by the Senate. *See Legal Board*, The National Law Journal, Nov. 8, 1993, at 10; *see also More Recess Appointments*, N.Y. Times, Jan. 7, 1991 at A16.

houses of Congress, was introduced.[16] The compromise bill provided for seventeen Directors, six appointed by the President from the public at-large and the remaining eleven appointed by the President from lists presented by various interested groups.

President Nixon vetoed this bill. His veto message evidences the conflict over the appointment of Directors:

> The restrictions which the Congress has imposed upon the President in the selection of directors of the Corporation is [sic] also an affront to the principle of accountability to the American people as a whole. Under congressional revisions, the President has full discretion to appoint only six of the seventeen directors. . . .
>
> The sole constituency [an LSC Board member] must represent is the whole American people. The best way to insure this in this case is the constitutional way — to provide a free hand in the appointive process to the one official accountable to, and answerable to, the whole American people — The President of the United States, and trust to the Senate of the United States to exercise its advice and consent function.

7 Weekly Comp. Pres. Doc. 1634-35 (Dec. 13, 1971).

The President's veto was sustained, and various compromise bills were introduced during the 92d Congress. None of these bills permitted the President full discretion to

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[16]The actual bill to pass the House was S. 2008, amended to contain the provisions of H.R. 10351. 117 Cong. Rec. 34737 (October 1, 1971).

appoint the members of the Board, and the threat of another veto prompted the 92d Congress to adjourn without passing a legal services corporation bill. *See* Warren E. George, *Development of the Legal Services Corporation*, 61 Cornell L. Rev. 681, 693 (1976).

In May 1973, President Nixon submitted a new legal services corporation bill to the 93d Congress. H.R.. 7824, 93d Cong., 1st Sess. (1973). The appointment provisions of this bill were virtually identical to the original bill President Nixon sent to Congress nearly two years before, but this Congress, in "a major concession," did not dispute the appointment procedures. 119 Cong. Rec. 40460 (Dec. 10, 1973) (remarks of Senator Mondale). President Nixon signed the bill into law on July 25, 1974. Act of July 25, 1974, Pub. L. No. 93-335, 88 Stat. 378 (codified at 42 U.S.C. §§ 2996-96l (Supp. IV, 1974)).

The government makes much of President Nixon's insistence that appointments to the LSC Board be made "in the constitutional way." Although "the constitutional way" certainly includes the Recess Appointments Clause, there is no indication that President Nixon meant anything other than the traditional Appointments Clause powers. In fact, President Nixon specifically stated that the President should be permitted to make appointments and the American people should "trust to the Senate of the United States to exercise its advice and consent function." 7 Weekly Comp. Pres. Doc. 1634-35 (Dec. 13, 1971). He never referred to the Recess Appointments Clause.

Indeed, it is impossible to ascertain whether President Nixon ever considered the Recess Appointments Clause in proposing this legislation. President Nixon left office shortly after the LSC Act went into effect, and he never made any appointments — let alone any recess appointments — to the LSC Board. It would, therefore, be inappropriate to attach

any clarifying significance to the quoted words of President Nixon.

Thus, based upon the language in the LSC Act and the language omitted from the LSC Act, and in the absence of any persuasive legislative history to the contrary, a vacancy does not occur on the LSC Board upon the expiration of a term of office of one of the Directors. A vacancy is created on the Board upon the resignation, death or removal of one of the sitting Directors. This conclusion does not, as the Government suggests, render the statute unconstitutional. The holdover provision does not infringe upon the President's recess appointment power, it merely defines when "vacancies" exist on the LSC Board sufficient to trigger application of the Recess Appointments Clause. Accordingly, plaintiff's motion for summary judgment on Count II will be granted. This determination renders Count III moot.

III. Conclusion

For the reasons expressed above, it is hereby

ORDERED that plaintiff's motion for summary judgment on Count I is granted; it is

FURTHER ORDERED that defendant's motion for summary judgment on Count I is denied; it is

FURTHER ORDERED that plaintiff's motion for summary judgment on Counts II and III is granted as to Count II and moot as to Count III, it is

FURTHER ORDERED that defendant's motion for summary judgment on Counts II and III is denied as to Count II and moot as to Count III; it is

FURTHER ORDERED that the United States' motion for summary judgment on Count II is denied; and it is

FURTHER ORDERED that, in light of the 1993 confirmations to the LSC Board, the sensitive nature of the prospective relief, and the passage of time since the filing of this complaint, it appears useful for the parties to explore the question of relief among themselves, attempting to reach an agreement consistent with this opinion and the needs of the LSC. The Court will, therefore, defer ruling on relief for the time being. If the parties are unable to resolve the issue of damages, plaintiff shall submit a memorandum detailing his position on damages on or before July 15, 1994; defendant's opposition shall be due on or before July 29, 1994; and plaintiff's reply, if any, shall be filed on or before August 5, 1994. Should the United States choose to state its position, it shall do so in accordance with the deadlines established herein for defendant.

IT IS SO ORDERED.
June 21, 1994

JOYCE HENS GREEN
United States District Judge

* * *

[Caption omitted in printing]

JUDGMENT

In accordance with the Memorandum Opinion and Order issued this date, judgment is hereby entered in favor of plaintiff, David L. Wilkinson, as to Counts I and II of the Second Amended Complaint, against defendant, Legal Services Corporation as to Counts I and II, and against defendant-intervenor United States of America as to Count II.

IT IS SO ORDERED.
June 21, 1994

JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
APR 12 1995

DAVID L. WILKINSON	)	
	)	
v.	)	Civil Action
	)	No. 91-0889 (JHG)
LEGAL SERVICES CORPORATION	)	

ORDER

There are two unresolved matters in this litigation: (1) defendant's motion for reconsideration; and (2) the appropriate relief to be awarded plaintiff. These issues will be addressed seriatim below.

1. Defendant's Motion for Reconsideration

This Court previously granted the motion of plaintiff, David L. Wilkinson, for summary judgment on Counts I and II of his Second Amended Complaint, which asserted claims for violations of the Government in the Sunshine Act ("Sunshine Act"), codified at 5 U.S.C. § 552b, and improper termination of plaintiff's employment contract. Defendant, the Legal Services Corporation ("LSC"), has asked this Court to reconsider this decision on both counts.

With regard to Count I, the LSC asserts that the transcripts at issue were properly withheld pursuant to Exemptions 10 and 9(B) of the Sunshine Act. The Court has previously ruled on this issue and will not consider LSC's new evidence in the absence of some plausible explanation why it was not previously submitted. The Court will decline LSC's invitation to "strike up the band again in order to allow the losing party to argue new material or a new

theory." Opposition of Defendant Legal Services Corporation to Plaintiff's Motion to Strike or Deny LSC's Motion for Reconsideration of the Order Granting Summary Judgment and to Strike LSC's Further Evidentiary Submission at 6 (quoting *Appeal of Sun Pipe Line Co.*, 831, F.2d 22, 25 (1st Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988)).

Defendant's argument with respect to Count II is that the LSC Board of Directors had *de facto* authority to act even if they lacked actual authority to do so. This argument was previously made by the defendant and will be rejected here as well. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case"), *cert. granted*, 114 S. Ct. 2703 *and cert. dismissed*, 115 S. Ct. 32 (1994).

2. The Appropriate Relief

The relief plaintiff requests on Count I is copies of the transcripts of the January 28, February 22, and March 25, 1991 meetings of the LSC Board of Directors. This request will be granted. In light of the nature of this relief, however, the judgment will be stayed pending final appellate resolution.

Count II presents a slightly more complicated situation. Mr. Wilkinson requests $224,600, representing lost salary for three years (less actual earnings during that period), estimated job search costs, interest through September 5, 1994, adjusted health insurance and dental care expenses and lost pension benefits. *See* Plaintiff's Reply Memorandum on Relief at 11. In addition, plaintiff seeks prejudgment interest from September 5, 1994 to the present, merit pay increases, reinstatement and front pay. Defendant challenges a number of these assertions; it claims that plaintiff failed to mitigate

his damages adequately, and that he is not entitled to prejudgment interest, merit pay increases, reinstatement or front pay.

First, the LSC asserts that plaintiff's recovery of back pay should be limited to the period from September 5, 1991 to the "spring of 1992", when plaintiff commenced a consulting relationship with the Federal Trade Commission ("FTC"). After this point, defendant asserts, Mr. Wilkinson no longer attempted to obtain employment comparable to his position at the LSC. Further, the LSC asserts that Mr. Wilkinson could have obtained a law firm partnership through which he could have earned considerably in excess of his salary at the LSC.

The duty to mitigate requires only that the plaintiff "use reasonable diligence in finding suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). A plaintiff is "not obliged to 'go into another line of work, accept a demotion, or take a demeaning position'". *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1212 (D.D.C.) (quoting *Ford Motor Co.*, 458 U.S. at 231), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990). The burden of proof on this issue is on the defendant, who must show that the plaintiff failed to mitigate his damages. *See Hopkins*, 737 F. Supp. at 1212. To make this showing, the LSC must establish that: (1) there were suitable positions available which Mr. Wilkinson could have obtained; and (2) that Mr. Wilkinson did not use reasonable diligence to seek out these positions. *See Sellers v. Delgado Comm. College*, 839 F.2d 1132 (5th Cir. 1988).

Defendant has not met its burden on the first prong. The LSC submitted the declaration of one legal recruiting expert in the Washington, D.C., area who opines that a candidate with plaintiff's qualifications could be placed as a partner in a law firm at an annual salary of $150,000 to $200,000. Plaintiff, on the other hand, submitted the

declaration of a lawyer with qualifications similar to his who has been unable, despite significant effort, to secure such employment. Even assuming that employment as a law firm partner is "suitable" for Mr. Wilkinson, therefore, the LSC has not carried its burden of proving that Mr. Wilkinson would have been able to secure such a position. Accordingly, plaintiff's requested damages will not be reduced for failure to mitigate.[1]

Next, the LSC argues that prejudgment interest is not warranted by either D.C. Code Ann. § 15-108[2] or D.C. Code Ann. § 15-109.[3] The parties dispute whether this case

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[1]The Court will, however, grant defendant's motion to strike a portion of plaintiff's September 16, 1994 declaration for substantially the reasons stated in that motion. The Court cannot find that Mr. Wilkinson made a reasonable effort to find suitable employment after he began with the FTC based on the information in the record; consideration of the supplemental declaration would be unfairly prejudicial to the defendant.

[2]Section 15-108 provides:

> In an action...to recover on a liquidated debt on which interest is payable by contract or by law or usage the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable... until paid.

[3]Section 15-109 provides, in pertinent part:

> In an action to recover damages for breach of contract the judgment shall allow interest on the amount for which it is rendered from the date of the judgment only. This section does not preclude the jury, or the court, if the trial be by the court, from including interest as an element in the damages awarded, if necessary to fully compensate the plaintiff.

is governed by § 15-108 or § 15-109 because it is not entirely clear whether the amount owed Mr. Wilkinson is a "liquidated debt". Nonetheless, even were this debt not liquidated, the Court would exercise its discretion under § 15-109 to award prejudgment interest. *See Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543 (1981). Mr. Wilkinson moved his family to Washington, D.C., from Utah to take over the new post as Inspector General of a controversial organization. An award of prejudgment interest is necessary to compensate him fully for the defendant's breach of the employment contract.

Finally, Mr. Wilkinson is not entitled to merit pay increases, reinstatement or front pay. There is no indication in the record that the LSC gives merit pay increases to the Inspector General, and the new, properly appointed board of directors of the LSC voted to terminate Mr. Wilkinson's employment contract effective September 5, 1994. Accordingly, it is hereby

ORDERED that LSC's motion for reconsideration is denied; it is FURTHER ORDERED that Defendant Legal Services Corporation's Motion for Leave to File a Motion to Strike, in Part, Plaintiff's Supplemental Declaration Concerning Relief on Count II is granted; it is

FURTHER ORDERED that Defendant Legal Services Corporation's Motion to Strike, in Part, Plaintiff's Supplemental Declaration Concerning Relief on Count II is granted; it is

FURTHER ORDERED that Defendant Legal Services Corporation's Motion for Leave to File a Supplemental Submission Regarding its Opposition Memorandum on Relief is granted; it is

FURTHER ORDERED that Defendant Legal Services Corporation's Motion for Leave to File a Supplemental Submission to Address a Factual Issue Raised by Plaintiff Concerning Deborah Gelin's Declaration is granted; it is

FURTHER ORDERED that the Motion of Defendant Legal Services Corporation for Leave to Submit Transcript and Brief Pages Under Seal for *In Camera* Review is denied; it is

FURTHER ORDERED that defendant shall produce to the plaintiff copies of the transcripts of the meetings of the Board of Directors of the Legal Services Corporation that took place on January 28, 1991, February 22, 1991 and March 25, 1991[4]; it is

FURTHER ORDERED that judgment will be entered on the accompanying judgment page for plaintiff in the amount of $224,600 in monetary damages, plus prejudgment interest at the legal rate from September 5, 1994 to the present; and it is

FURTHER ORDERED that the question of plaintiff's entitlement to attorneys' fees shall be stayed. Plaintiff shall file his motion for attorneys' fees within 10 days of the final appellate action in this case.

IT IS SO ORDERED.
April 12, 1995

JOYCE HENS GREEN
United States District Judge

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[4]This portion of the accompanying judgment will be stayed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
APR 12 1995

DAVID L. WILKINSON	)	
	)	
v.	)	Civil Action
	)	No. 91-0889 (JHG)
LEGAL SERVICES CORPORATION	)	
	)	

JUDGMENT

In accordance with the Order issued this date, judgment is hereby entered in favor of plaintiff David L. Wilkinson and against defendant Legal Services Corporation on Count I of the Second Amended Complaint. Defendant shall provide to the plaintiff copies of the transcripts of the meetings of the Board of Directors of the Legal Services Corporation that took place on January 28, 1991, February 22, 1991 and March 25, 1991. This portion of the judgment shall be stayed pending final appellate resolution of this matter.

Judgment is further entered in favor of plaintiff David L. Wilkinson and against defendant Legal Services Corporation on Count II of the Second Amended Complaint in the amount of two hundred twenty-four thousand six hundred dollars and no cents ($224,600.00) plus prejudgment interest at the legal rate from September 5, 1994 to this date.

IT IS SO ORDERED.
April 12, 1995

JOYCE HENS GREEN
United States District Judge

(2)

Supreme Court, U.S.
FILED
SEP 13 1996
CLERK

No. 96-43

In The

Supreme Court of the United States

October Term, 1995

DAVID L. WILKINSON,

Petitioner,

v.

LEGAL SERVICES CORPORATION
AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF LEGAL SERVICES CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit correctly applied the doctrine of constitutional estoppel in holding that the Legal Services Corporation's inspector general was estopped to challenge the authority of the Corporation's board of directors in voting not to renew his written employment contract, ostensibly because its members were appointed under the recess appointments clause, where the inspector general (1) was charged by law with monitoring the corporation's functions and reporting directly to the board of directors; (2) for nearly two years knowingly served a board whose members were appointed under the recess appointments clause; and (3) repeatedly requested and received from that board salary increases, benefits and operating funds.

CORPORATE AFFILIATION STATEMENT

Respondent Legal Services Corporation has no parent companies or subsidiaries.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Legal Services Corporation requests that the petition of David L. Wilkinson for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be denied.

COUNTERSTATEMENT OF THE CASE

The Legal Services Corporation ("LSC") is a private, non-profit, tax-exempt corporation created by Congress. Its mission is to provide financial support throughout the United States for legal assistance in non-criminal proceedings and matters to persons unable to afford an attorney. LSC is governed by an eleven-member board of directors (the "board") appointed by the President and confirmed by the Senate. Directors serve three-year terms and, when a director's term expires, he or she continues to serve under a "holdover" provision until a successor has been "appointed and qualified." 42 U.S.C. §§ 2996b, 2996c(a) and 2996c(b).

History of Recess Appointments to the Board.

Throughout its existence, LSC has had directors appointed to its board under the recess appointment clause of the Constitution. This practice, until very recently, was endorsed by all three branches of the federal government.

President Carter made the first recess appointments in 1978, a group of five directors who subsequently were

confirmed for regular terms by the Senate. They remained in office after the expiration of their terms under the LSC Act's "holdover" provision. In 1981, President Reagan replaced them with a slate of recess-appointees. The Carter "holdovers" filed suit to prevent the Reagan recess-appointees from taking office, contending the LSC Act did not permit recess appointments. The United States District Court for the District of Columbia rejected that argument in *McCalpin v. Dana* (D.D.C. Oct. 5, 1982).[1] While *McCalpin* was on appeal, the Reagan recess-appointees were nominated for regular terms and confirmed by the Senate, which mooted the appeal. *McCalpin v. Dana*, 776 F.2d 535 (D.C. Cir. 1985). After completing their regular terms, the Reagan directors remained in office as "holdovers," until they were replaced by President Bush's recess-appointees in November 1989 and January 1990. Thereafter, the Reagan directors relinquished their offices without challenge, and permitted the governance of LSC to be transferred to a board comprised of Bush recess-appointees (the "1990 recess appointments board"). The members of the 1990 recess appointments board were nominated for regular terms, but when the Senate failed to act on their nominations, they again received recess appointments in January 1991 (the "1991 recess appointments board"). The Bush recess-appointees

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[1] In reaching its decision, the district court relied upon *Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979), which also upheld the validity of recess appointments. No contrary decision on recess appointments would appear, generally, until *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), and none would appear with respect to LSC until the district court's 1994 decision in this case.

remained in office without Senate confirmation, until they were replaced by President Clinton's confirmed appointments in 1993. (J.A. 80-83.)[2]

During this period, Congress considered the issue of recess appointments to LSC's board on several occasions, including a bill to amend the LSC Act expressly to prohibit recess appointments. Congress did not enact that bill, and it continued to fund and to maintain oversight of LSC throughout its existence without regard to the presence of recess appointees on its boards. (J.A. 113-119.)[3]

Wilkinson's Service to the Recess Appointments Boards.

In 1988, Congress mandated that LSC have an inspector general. On August 17, 1989, LSC appointed David L. Wilkinson as its first inspector general under a written contract of employment. Under paragraph 6 of the contract, LSC had the option of extending his employment

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[2] Citations refer to the joint appendix filed by the parties with the D.C. Circuit ("J.A.") and the appendix to the petition for writ of certiorari ("A").

[3] For example, in March 1978, when President Carter's recess appointees to the board were presented to the Senate, Senator Javits expressed concern that the President could not make recess appointments to the board because its members may not be "officers" of the United States. He placed into the record a formal opinion by the Justice Department stating that it was within the President's power to make recess appointments to the board, and an analysis of the opinion by the Library of Congress indicating that there were serious questions on the matter and that "[r]esolution . . . may require either clearer guidance from Congress or the Courts." (124 Cong. Rec. 7690 (1978)).

for one-year increments, beginning on September 5, 1991. Paragraph 6 provided that, "[i]n the event either party shall not desire such an extension, notice must be given to the other party by March 5, 1991 . . . " (J.A. 125.)

At the time of Wilkinson's appointment in August 1989, LSC was governed by the Reagan "holdover" directors. By November 1989, however, the first of President Bush's recess appointments had been made, and by January 1990, the 1990 recess appointments board had been appointed. Wilkinson, who was aware of the recess appointments, would spend the next nineteen of his twenty-four months as inspector general – eighty percent of his tenure – serving and reporting to recess appointments boards. Despite a statutory obligation to "investigate" and "report" "problems and deficiencies, and the need for corrective actions" to LSC, as well as a self-professed interest in the operations of the board itself, Wilkinson consistently considered and treated the recess appointments boards as the valid and authoritative "head" of LSC and never once raised the issue of the validity of recess appointments in any official communication or report to the boards, Congress, or anyone else until he was out of office and engaged in this lawsuit. (5 U.S.C. app. 3 §§ 2 and 4(a)(5); J.A. 80-83, 242-247, 252, 304, 335-336, 338-339.)

Wilkinson's Requests For and Receipt of Benefits From The Recess Appointments Boards.

From the outset of his tenure, Wilkinson felt strongly that LSC's board of directors, as distinguished from its president, was the organization's "head" for purposes of his reporting responsibilities under the Inspector General

Act. In an unsolicited June 1990 legal opinion, Wilkinson so advised the board, at a time when it was composed entirely of President Bush's recess appointees. (J.A. 127-131.)[4] Consistent with his view, Wilkinson delivered his official reports, recommendations, and requests for action related to his salary and benefits, official duties, and operation of the Office of Inspector General ("OIG"), to recess appointments boards, without ever questioning their power to receive or act on them. (J.A. 132, 135-137.)[5]

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[4] On August 21, 1990, at a time when LSC was governed by the 1990 recess appointments board, the Office of Management and Budget officially recognized the board as LSC's "head" in a notice published in the Federal Register. (J.A. 80.)

[5] Wilkinson's course of conduct is well-illustrated by the memoranda he routinely addressed to the "Board of Directors" and delivered to the 1990 and 1991 recess appointments boards. In these memoranda, Wilkinson stated outright, or otherwise made manifest, his belief that the recess appointments boards were the duly constituted "head" of LSC. (*See* J.A. 132-134, 135-137, 138-143, 144-148, 170-173, 174-178, 179-189.) As Wilkinson stated in a semiannual report issued a week after he filed his April 23, 1991 complaint:

> Structurally, the office [of Inspector General] has had four different "heads" for purposes of the IG Act . . . within a nine month period. These were: the last LSC president; an interim president; the 1990 LSC Board; and the current LSC Board. For a period of over two months, LSC had no head; the 1990 Board of Directors *ceased to exist when the terms of all its recess-appointed members expired* and a *replacement* board was not named until over two months later.

(J.A. 152) (emphasis supplied). Clearly, he viewed the recess boards as LSC "heads" for as long as they held their recess appointments.

1. Board Action Relating to Wilkinson's Employment.

One of the first matters addressed by the 1990 recess appointments board when it held its first meeting in February 1990 was the need to provide funds to establish Wilkinson's office and salary, as Wilkinson had been hired without Congressional funding.[6] The necessary funds, based on a proposed budget prepared and presented by Wilkinson himself, were allocated at the board's second meeting in March 1990, at which Wilkinson was present.[7]

The 1990 and 1991 recess appointments boards also provided Wilkinson with COLA increases in each of those two years. Both increases were beyond what he was entitled to receive under his employment contract. (A6-A7; J.A. 124, 355-356, 365-366.)[8] Wilkinson also received pension and insurance benefits as a result of recess board action. (A7, n.2; J.A. 355-366, 365-366.) Wilkinson

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[6] As LSC's president stated at the board's February 1990 meeting, Congress had mandated that LSC have an IG without appropriating funds to establish and maintain an IG's office. Noting that Mr. Wilkinson had been hired several months earlier without Congressional funding, LSC's president asked the recess board to allocate part of the "carry over" funds from FY 1989 to fund the establishment of the IG's office and salary. (LSC's Reply In Support of Its Submission of Supplemental Material filed in the D.C. Circuit Mar. 5, 1996 ("Reply Supp. Mat.") at 2-5 and Declaration of Victor Fortuno, Esquire Fortuno Decl., Item I at 54-55, 99-101, 116-119, 125, 133, 135-136, 153.)

[7] Reply Supp. Mat. at 4-5 and Fortuno Decl., Item 2 at 1-2, 126, 144-45 and 146.

[8] *See also* LSC's Supplemental Submission in Response to the Court's Post-Oral Argument Order filed in the D.C. Circuit Feb. 23, 1996 at 5-6 and Exhibit B; Reply Supp. Mat., Item 1 at 126-129.

accepted and retained his salary, COLA increases, and benefits without ever questioning the recess boards' power to provide them.[9]

2. Recess Board Action Relating to Wilkinson's Duties.

During his tenure, Wilkinson requested and received favorable action on numerous matters relating to his office, including:

- allocation of funding necessary to establish the IG's office and salary out of LSC's "carry over" funds (See n.6 *supra.*);
- establishment of the IG Oversight Committee to deal directly with Wilkinson as IG and to provide him with "ready access" to LSC's "head" as required by the IG Act, which was approved by a recess appointments board January 28, 1991 (J.A. 136, 174);
- appropriation of LSC funds for the OIG's budget, which included the board's March 1990 approval of a three-fold increase over Wilkinson's FY 1990 projected budget to enable him to expand the OIG's professional staff (J.A. 174-176); and
- personnel hiring authorization, an auditor for the OIG staff, and various memoranda of understanding governing relations between

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[9] Wilkinson, as well as LSC, consistently considered the recess appointments boards as his supervisor for personnel and employment matters. (J.A. 135-137, 139, 322-327, 344-345.) Moreover, Wilkinson's belief in this regard predated the OMB notice designating the board as LSC's "head" for purposes of the Inspector General Act. (J.A. 127-131, 132-134, 135-137.)

the OIG and various LSC departments (J.A. 138-143, 187, 265).

Wilkinson accepted the benefits of these favorable actions and spent the federal funds appropriated for the OIG by the recess appointments boards, without question or challenge to their authority to act. (J.A. 149-167, 175-176, 178.)

Of special note is Wilkinson's relationship with the IG Oversight Committee, an entity he asked the board to create. (J.A. 136.) Wilkinson routinely reported to and made requests of the Committee, including his presentation of several draft memoranda of understanding to govern relations between the OIG and LSC. (J.A. 136, 174, 179-185, 187.) He even recommended that the board expand the power and authority of the Committee to give it "substantial input into the IG's budget instead of having the IG communicate directly with [the board's Audit and Appropriation Committee]." (J.A. 175, 191, 197, 200.)

The Non-renewal of Wilkinson's Employment Contract.

On February 22, 1991, the 1991 recess appointments board, after considering the recommendation of the IG Oversight Committee that it would not be in LSC's best interest to renew Wilkinson's employment contract, voted unanimously, with one member abstaining, not to renew Wilkinson's employment contract for the year September 5, 1991 through September 5, 1992. Although Wilkinson has characterized this action as a "termination," it was not. The board gave Wilkinson the six months' notice required by paragraph 6 of the employment agreement. (J.A. 125, 197-200, 231-233, 234, 235-238.)

Procedural History

On April 23, 1991, Wilkinson filed a one count complaint against LSC under the Government in the Sunshine Act, 5 U.S.C. § 552b, seeking access to transcripts of closed executive sessions in which his employment was discussed. (J.A. 12-16.) On August 12, 1991, Wilkinson amended his complaint to challenge the recess appointments of the members of the board that voted not to renew his contract. (J.A. 17-30.) The United States intervened on the recess appointments issue. The district court agreed with Wilkinson on that issue and awarded him $224,600 in damages. (J.A. 100-106.)

LSC filed a motion for reconsideration, which was denied. LSC and the United States then filed timely appeals.[10] The United States Court of Appeals for the

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[10] LSC did not take a position on the recess appointments issue before the D.C. Circuit, arguing that regardless of the validity of those appointments, Wilkinson was barred from recovery either by the *de facto* officer doctrine or on equitable grounds. (A4.) As LSC explained at oral argument, the defense of this case was instituted under the direction of a board composed of President Bush's recess-appointees. By the time the case reached the appeal stage, however, LSC was governed by a board of confirmed directors appointed by President Clinton. The latter board recognized that reasonable minds have differed over the question of recess appointments, with four district court decisions on the subject – two of which involved LSC – evenly split. The board also recognized that no particular LSC board would ever be in a position to approach the issue free of questions of personal conflict due to the manner in which its own members had been appointed. Thus, the board elected to refrain from taking a position, asking that a decision be made to put the matter to rest and that Wilkinson, *in any case*, be denied recovery.

District of Columbia Circuit reversed and remanded. Relying on its decision in *Robertson v. F.E.C.*, 45 F.3d 486 (D.C. Cir. 1995) and the record of Wilkinson's conduct, the D.C. Circuit concluded that Wilkinson was estopped to challenge the board's authority to act for LSC by his receipt and acceptance of benefits from the board.

REASONS FOR DENYING THE WRIT

Petitioner fails to demonstrate grounds for review of the D.C. Circuit's decision, as it does not present a constitutional issue, an important question of federal law, or a conflict with the decisions of this Court or those of other Circuit Courts. To the contrary, the D.C. Circuit's decision properly avoided a constitutional issue by deciding the case on other grounds, and it did so by faithfully and correctly applying an estoppel doctrine long favored by this Court. Nonetheless, petitioner erroneously contends that (1) the D.C. Circuit's avoidance of the constitutional issue itself raises constitutional issues under Article III Section 2 ("case or controversy") and the First Amendment; (2) the D.C. Circuit's application of constitutional estoppel conflicts with the decisions of this Court and the other Circuit Courts; and (3) the D.C. Circuit's decision conflicts with this Court's recent decision in *Ryder v. United States*, 115 S. Ct. 2031 (1995).

A. The D.C. Circuit's Decision Does Not Raise A Constitutional Issue.

The D.C. Circuit properly avoided the only constitutional issue raised below – the validity of recess appointments to LSC's board – and thus its decision does not present a constitutional issue for review by this Court. Nonetheless, petitioner attempts to create a constitutional issue by contending that the D.C. Circuit, by failing to reach the recess appointment issue, breached its constitutional duty to decide a "case or controversy." He also contends that this alleged failure violated his first amendment right to petition the government. (Pet. at 16-18.)

Petitioner's first point simply ignores this Court's well-established rule that federal courts are obliged to avoid decisions on constitutional questions where a dispute can be resolved on non-constitutional grounds. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445-46 (1988). There is neither a "duty" to decide a constitutional issue, simply because it has been presented, nor a "right" to have one decided. The D.C. Circuit adhered to that rule by properly agreeing with LSC that, *regardless* of the validity of recess appointments, petitioner is barred from recovery on equitable grounds.

Petitioner's second point ignores the record, which demonstrates that his right to petition the government and to "raise constitutional and statutory challenges" was given full play in this case. (Pet. at 17.)

B. The D.C. Circuit's Decision Is Not In Conflict With The Rulings of This Court or Other Circuits.

Wilkinson presented the D.C. Circuit with one of the paradigm situations for applying constitutional estoppel, *i.e.*, the person who requests favorable action from a body, but then seeks to avoid an unfavorable result by claiming, *post hoc*, that the body lacked authority to act at all. The particular facts of Wilkinson's case only strengthen the case for applying the doctrine: Wilkinson's status as an "insider" with statutory and fiduciary duties to report deficiencies to the board as LSC's inspector general; his repeated requests for and receipt of personal and official benefits over a nearly two-year period; his service over that period to the board without ever questioning its authority to act for LSC; and the fact that the board stands accused of nothing more than the good faith exercise of corporate power in the non-renewal of an employment contract. In sum, it is difficult to imagine a more suitable situation for the application of constitutional estoppel.

Nonetheless, Wilkinson contends that prior decisions of this Court have limited the doctrine to cases in which there have been (1) affirmative steps to obtain "unique" or "special benefits from a statutory scheme or program"; (2) a showing of substantial prejudice; and (3) a constitutional attack on the validity of a statute. (Pet. at 11-13.) Petitioner contends that (1) he was merely a "passive or incidental" recipient of benefits; (2) LSC was not prejudiced; and (3) he was not challenging the constitutionality of a statute. (*Id.*) Petitioner misstates the law, as well as the facts.

1. "Passive" Recipients of Benefits Are Not Exempted From the Doctrine of Constitutional Estoppel and, Even If They Were, Wilkinson Would Not Qualify As One.

Petitioner's contention that constitutional estoppel is limited to those who take "affirmative" steps to receive "special" or "unique" benefits fails for three reasons. First, he is raising this issue for the first time. Second, it is not supported by the law. Third, even if it were supported by the law, it is not supported by the facts.

First, petitioner did not raise this issue before the D.C. Circuit. He cannot raise it now for the first time.[11] *Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us.")

Second, it simply is not the case that "passive or incidental" recipients of benefits are exempted from the doctrine. The principle is illustrated by *Arnett v. Kennedy*, 416 U.S. 134 (1974), the only employment discharge case cited by petitioner, and one he sponsors as an exemplar of the "traditional" application of the doctrine that allegedly has been ignored by the D.C. Circuit. (Pet. at 12, n.9.) Kennedy was a non-probationary federal employee who had been discharged by his supervisor pursuant to the terms and procedures of a federal statute. The statute permitted discharge only on grounds of cause. Where

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[11] In his post-oral argument brief, petitioner's only argument against application of the doctrine was that "his employment was in no way traceable to any action of the recess appointments board." Post-Argument Memorandum for Appellee filed in the D.C. Circuit, February 23, 1996, at 9.

discharge occurred, the statute required that the employee be given written notice and an opportunity to respond in writing, but without a trial-type hearing. Kennedy filed suit, contending that the absence of a trial-type hearing violated his constitutional right of due process. A three-judge district court panel agreed. On direct appeal, this Court reversed, noting that Kennedy was seeking to "bifurcate" the statute so that he could retain the benefit of its "for cause" restriction on discharge, while avoiding the burden of its discharge procedure. 416 U.S. at 153-154. As this Court concluded, Kennedy "must take the bitter with the sweet." (*Id.*) In reaching this conclusion, this Court took no note of Kennedy being a "passive or incidental" recipient of any "special" or "unique" benefit afforded him by the statute, nor had Kennedy done anything "affirmative" to obtain that benefit, which was bestowed by operation of the statute on all non-probationary federal employees based solely on their status. *See also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 323 (1935) ("[O]ne who *accepts* the benefits of a statute cannot be heard to question its constitutionality") (emphasis supplied).

If, as petitioner suggests, *Arnett* represents the "traditional" application of the doctrine, the D.C. Circuit's application in this case is firmly within that tradition. The recess board's employment decisions conferred benefits and burdens upon LSC's employees in the same "passive or incidental" sense as did the statute in *Arnett*. As Kennedy was estopped from challenging the source of the burden of which he complained, *i.e.*, the statute, by his "passive" receipt of the statute's benefit, so, too, is Wilkinson estopped from challenging the source of the burden he complained of, *i.e.*, the board's power to act for

LSC, by his "passive" receipt of the benefits of the board's earlier actions on behalf of LSC.[12]

In relying on *Arnett*, petitioner also fails to take account of the fact that it belongs to a category of cases that is readily distinguishable from his situation, as it deals with benefits obtained under a statute. Such benefits often are obtained "passively," as one may need do nothing more than be subject to the statute. Another category of cases, challenges to actions by regulatory bodies, provides a closer analogy to Wilkinson's case. This Court has applied constitutional estoppel to such

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[12] *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456-457 (1988), also relied upon by petitioner, is distinguishable from both *Arnett* and this case on the ground that the statute under challenge in *Kadrmas* imposed a burden upon the petitioner without any "apparent" benefit. *Id.* at 457. Thus, the petitioners were not seeking to retain benefits while avoiding burdens, as is the case with Wilkinson. *See also Thompson v. Consolidated Gas Utilities Corporation*, 300 U.S. 55, 81 (1936) (petitioners not subject to estoppel, as they "do not assert rights under the statute they assail."); *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 768-769 (11th Cir. 1991) (non-minority contractor not estopped from challenging constitutionality of DOT regulations benefiting minority contractors as the regulations were not intended to benefit, and there was no showing that they did benefit, the non-minority contractor); *Brockert v. Skornicka*, 711 F.2d 1376, 1380 (7th Cir. 1983) (municipal employee who was denied a waiver from municipal residency policy, where waiver had been granted in the past, was not seeking simultaneously to retain a benefit while avoiding a burden); *Spaulding v. Douglas Aircraft Co.*, 154 F.2d 419, 422 (9th Cir. 1946) (subcontractor not estopped from challenging constitutionality of statutory provision where validity of the provision affects only subcontractor's performance obligations under a private contract with prime contractor and not its rights under the statute).

challenges according to a simple equitable principle: one who has "invoked" or "procured" action by a body "may not later, when dissatisfied with the result, assail [that] action" on constitutional grounds. *United Gas Co. v. Railroad Comm. of Kentucky*, 278 U.S. 300, 308 (1928) (estoppel applied to gas producer who unsuccessfully petitioned state regulatory commission for rate increase) (citations omitted). *See also Spaulding v. Douglas Aircraft Co.*, 154 F.2d 419, 422 (9th Cir. 1946). Application of the doctrine in these cases does not require receipt of a benefit at all, let alone a "unique" or "special" one. What is required is that action be "invoked" or "procured," and for the reasons set forth above, petitioner clearly has done so.

Finally, and from a factual perspective, Wilkinson was anything but a "passive or incidental" recipient of benefits. Contrary to his assertions, Wilkinson "invoked" and "procured" actions by the recess appointments boards in routine fashion, including presentation of a budget for the establishment of his office and salary.[13] In addition to personal benefits, Wilkinson requested and received a variety of benefits related to his official duties, which also may be considered.

2. Petitioner's "Prejudice" Argument Is Legally and Factually Mistaken.

Petitioner contends that the D.C. Circuit overlooked what he contends is an important limitation on the doctrine of constitutional estoppel, a finding of substantial

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[13] Wilkinson certainly knew that the budget would be acted upon by a board of recess appointees.

prejudice or change of position based on "anything Petitioner did actively, or passively." (Pet. at 13, citing *Ashwander*, 297 U.S. at 323.) Petitioner's contention is erroneous.

First, *Ashwander* is distinguishable on its facts, as it concerned a shareholder derivative action and took into account the conduct of the respondent corporation, not the petitioner. Second, the D.C. Circuit expressly noted LSC's substantial prejudice and change of position in its opinion. *See also Robertson v. F.E.C.*, 45 F.3d 486 (D.C. Cir. 1995) (applying doctrine where benefit obtained was matching funds for a presidential campaign wherein personal use of the funds would have been illegal).

Third, LSC's prejudice clearly flowed from petitioner's active conduct, including (a) advising the recess appointments boards that he considered them to be the legitimate "head" of LSC; (b) treating those boards as LSC's legitimate "head" by submitting to them his official annual reports, proposed budgets (through LSC's president), and other requests for favorable budgetary and other action; and (c) retaining the salary, COLA increases, and benefits paid to him without complaint (which does not seem to LSC to be at all "passive"). Based on these actions, the recess appointments boards allocated funds for Wilkinson's office, salary, COLA increases, and insurance benefits. They also took the step of voting not to renew his contract. Had Wilkinson advised the recess appointments boards that he believed they lacked authority to act for the corporation, they could have avoided the allocation and payment of funds for his office, salary, COLA increases, and benefits, as well as the other actions he requested. The 1991 recess appointments board could

have avoided the non-renewal of petitioner's contract and this long and costly lawsuit.

3. Petitioner's Contention That the Doctrine Is Limited To Constitutional Attacks On the Validity of Statutes Is Mistaken.

Petitioner attempts to distinguish his circumstance from virtually all applications of constitutional estoppel by contending that his attack on the unfavorable employment action is based upon his reading of the requirements of the LSC Act, as opposed to a challenge to the validity of the Act itself. Petitioner's argument is semantical, at best, presenting a distinction without a difference.

First, petitioner's lawsuit sought to invalidate board action by challenging the validity of President Bush's recess appointments, arguing in effect that the President had exceeded his constitutional authority in making them. There is no functional difference between that challenge and the one in *Robertson v. F.E.C.*, in which the petitioner also relied upon allegedly unconstitutional appointments to attempt to invalidate a specific unfavorable agency action. Just as there is no functional distinction between the two cases, there is no basis for treating them differently with respect to the application of the doctrine of constitutional estoppel. The point of the doctrine – to prevent someone from simultaneously retaining benefits while avoiding burdens – is equally well-served in both cases.

Second, assuming *arguendo* that the absence of a constitutional attack on a statute (as opposed to appointments) is a substantive distinction, such that it may not

fairly be called "constitutional," the argument proceeds no farther than nomenclature. As the D.C. Circuit noted, "constitutional estoppel is just one application of the estoppel concept, a branch of equity." *Id.* at A6.

C. The D.C. Circuit's Decision Does Not Conflict With This Court's Decision in *Ryder v. United States*.

Petitioner concedes that there is no conflict between the D.C. Circuit's decision and *Ryder v. United States*, 115 S. Ct. 2031 (1995) on the only issue they have in common – application of the *de facto* officer doctrine. (Petition at 15.) Nonetheless, he contends that the D.C. Circuit "missed the fundamental point" of *Ryder*:

> one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation has indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments.

Petition at 15, *quoting Ryder*, 132 L.Ed.2d at 143. Petitioner argues that the D.C. Circuit's decision creates a disincentive to raise challenges to appointments, and that it places people like himself in the position of having to return or refuse their salaries in order to raise the challenge. The distinctions between this case and *Ryder* overwhelm petitioner's contentions.

First, the passage quoted from *Ryder* by petitioner concerned the *de facto* officer doctrine, a defense on the

merits. Petitioner's attempt to stretch that passage to include constitutional estoppel ignores the purpose of an estoppel defense, which is to preclude a party from raising a claim or issue, *regardless of its merits*, because it would be inequitable to permit that person to obtain relief.

Second, the *Ryder* case lacked the aspects of conduct and relationship presented in this case. Ryder was a criminal defendant challenging the appointment of particular appellate judges *before* they acted. He had no prior relationship with those judges, had never accepted or acknowledged their authority, and had never requested or received any benefits from them. In sum, there was nothing inequitable about his conduct *vis-a-vis* those whose power to act he questioned. By contrast, Wilkinson was an official of LSC, an "insider," challenging the appointments of two boards of directors he had served for nearly two years. Like Ryder, Wilkinson should have raised the recess appointments issue at the very outset, not after favorable action ceased and a burden was imposed.[14]

Finally, *Ryder* should not be used to create litigation "incentives" for an Inspector General, with a statutory, as

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[14] Petitioner asserts that it will place people in an uncomfortable "bind" if they must bring early challenges or forego benefits, like salary, in order to avoid an estoppel defense. (Petition at 16.) But what he is really suggesting is that people be permitted to behave inequitably, to draw benefits until such time as they can determine "whether litigation is really necessary," *i.e.*, until benefits cease and burdens begin and litigation becomes "necessary" to avoid them. (*Id.*) That is not what Ryder did, and it is not what *Ryder* protects.

well as a fiduciary, duty to bring defects to the attention of the board for the good of the corporation. To the contrary, estopping Wilkinson serves the important federal policy of barring officials hired to investigate governmental operations from using information they gather through their employment for personal gain via litigation.[15] It sends the wrong message to allow an inspector general to collect $224,000, plus attorneys fees, from the very organization he was sworn to serve, especially where he filed his lawsuit while he was still inspector general.

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[15] *See United States, ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991), *reh'g denied*, 501 U.S. 1270 (1991) (quality assurance specialist for U.S. government did not qualify as "original source" for purposes of bringing Qui Tam action, as it was a responsibility and condition of his employment to uncover fraud). *See also United States ex rel. Fine v. University of California*, 72 F.3d 740, 742-745 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1877 (1996) (fact that former auditor for Inspector General was employed specifically to report fraud was sufficient to render his disclosures non-voluntary and, thus, he was not an "original Source" for purposes of false claims act).

CONCLUSION

Petitioner has failed to demonstrate grounds for review of the D.C. Circuit's decision in this case. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1995

DAVID L. WILKINSON,

Petitioner,

v.

LEGAL SERVICES CORPORATION
And The UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner David Wilkinson replies as follows to the Brief of Legal Services Corporation In Opposition To Petition For A Writ Of Certiorari ("LSC Opp."). The Solicitor General elected not to submit any response to the petition.

1. LSC's view of constitutional estoppel, broader even than that embraced by the court of appeals, demonstrates the state of confusion the doctrine is now in. For example, LSC seeks to justify its application in this case based on a wide range of actions by Petitioner, as Inspector General, while recess-appointed boards were running the corporation. LSC Opp., pp. 6-8, 12, 16. These include requesting funds needed to set up the Office of Inspector General ("OIG"); proposing to expand the OIG professional staff; seeking authorization to hire personnel, including a staff auditor; and submitting "various memoranda of understanding governing relations between the OIG and various LSC departments" as well as budget material. The court below did not rely on any of those actions as grounds for estoppel but based its decision solely on Petitioner's personal receipt of compensation and new employment benefits.[1] A6-A7.

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[1] Petitioner did not need (and did not request) any action by the recess-appointees to authorize his own salary, since he had a contractual right to be paid for his services. LSC erroneously states that Petitioner requested salary increases and personal benefits for himself from the recess-appointees (LSC Opp. at i, 5, 16); there is no support for that in the record, and it did not happen. Petitioner also had a right to stay on as Inspector General under his employment contract, unless the LSC board affirmatively acted by a certain date each year to discontinue the arrangement. (A12). Thus, the court of appeals was wrong in implying that an affirmative decision would have had to be made by the recess-appointed board for Petitioner to keep his job from one year to the next. (*See* A7).

LSC simply ignores the fact that Petitioner had a signed contract of employment as the corporation's first Inspector General, obligating him to do just the kinds of things it lists. There is no dispute that Petitioner was duly appointed to that position under a board which had been lawfully appointed, with Senate confirmation, pursuant to the statute. What was Petitioner supposed to do when recess-appointees arrived and took command? To whom should he have reported, in light of OMB's ruling that the board of directors was the "head" of LSC for purposes of the Inspector General Act?

LSC's version of constitutional estoppel would place everyone doing their jobs at risk of forfeiting the personal right to challenge supervisors' legal authority. Under the LSC theory, Petitioner's only "safe" course — had he then known or suspected that the directors were illegally appointed and might some day undertake to fire him — would have been to stop performing the duties of his position and contest their authority. Perhaps the D.C. Circuit's approach would allow Petitioner to continue working without losing the opportunity to dispute the directors' authority, but not to receive compensation — an equally irrational result.

Illustrating the illogic and perplexity which surrounds constitutional estoppel even among sophisticated practitioners (and jurists), the LSC brief underscores why review should be granted. Only this Court can provide the needed clarification of this unevenly-applied, judge-made doctrine, which was used here to foreclose the resolution of important legal issues duly raised by a plaintiff with undoubted Article III standing.

2. *Arnett v Kennedy*, 416 U.S. 134, 153 (1974), correctly described the purpose of constitutional estoppel and its

uncertain application, but little else in that case remains good law. Specifically, the "bitter-with-the-sweet" concept seized on by LSC from the plurality opinion in *Arnett* — that one who receives benefits under a government program "must take the bitter with the sweet" and thus loses the right to attack procedural deficiencies of the program — has been expressly repudiated in more recent decisions of this Court. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540-41 (1985). LSC's heavy reliance on *Arnett* (LSC Opp., pp. 13-15) is misplaced and highlights the difficulty faced by LSC in defending the decision below on its own terms.

3. In an ironic twist, LSC now objects that Petitioner failed to argue in the court of appeals that passive receipt of benefits is not a sufficient basis for estoppel. LSC Opp. at 13. However, since neither of the appellants below mentioned the defense of constitutional estoppel in their briefs or in oral argument, nor cited any cases or authority involving the doctrine, there was no reason for Petitioner to address it at all. Instead, the issue was raised *sua sponte* by the court of appeals **after** briefing and argument was completed. (A10).[2]

In any event, as soon as the matter was raised by the panel, Petitioner did unmistakably claim that constitutional estoppel does not apply to this case. *See* Post-Arg. Mem. For Appellee, filed Feb. 23, 1996, D.C. Cir. No. 95-5144, at 3. Contrary to LSC's view, this Court's jurisprudence does not

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[2] The court requested simultaneous submissions concerning, *inter alia*, "the equitable estoppel argument implied in the Corporation's brief," directing the parties to "indicate the applicability, if any, of *Robertson v. FEC*, 45 F.3d 486, 489-90 (D.C. Cir. 1995)." (A10). No opportunity was provided for Petitioner to respond to LSC's submission on this issue.

require all ***arguments*** supporting a claim to be made in the appellate court. Rather, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp.*, 130 L.Ed. 2d 902, 909 (1995), *quoting Yee v. Escondido*, 118 L.Ed. 2d 153, 169 (1992). Moreover the court of appeals not only raised the issue but passed upon it, holding that Petitioner's mere receipt of compensation and employment benefits was enough to apply constitutional estoppel under *Robertson*. (A6-A7). There was no waiver or omission below that would bar Petitioner's argument in this Court. *See Lebron*, 130 L.Ed. 2d at 909; *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

4. The fact that Petitioner did not contest the authority of LSC's recess-appointed directors before they voted to separate him is immaterial.[3] As its inspector general, Petitioner did not hold a legal position at LSC, and there is no evidence that Petitioner was even aware at the time that the recess appointments were of dubious validity. The court of appeals flatly rejected LSC's theory that Petitioner was

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[3] LSC wrongly implies that Petitioner first questioned the directors' appointments in this lawsuit (LSC Opp. at 4); however, its counsel correctly represented to the court of appeals that the appointments issue was discussed between the parties' counsel many months before it was asserted in the litigation. *See* Letter from Shapiro and Olander to Clerk of the D.C. Circuit, Feb. 23, 1996. Of course, LSC's general counsel and some directors were well aware of the lurking question. The possible invalidity of the directors' appointments was obviously not "inside information" which Petitioner somehow misappropriated for his own personal gain, contrary to LSC's silly suggestion. (LSC Opp. at 21).

obligated to give advance notice of his claim that the directors' appointments were defective. Because there was nothing the directors could have done to remedy the situation, the court held, any such notice would have been pointless. (A5).

CONCLUSION

By illustrating how muddled and confusing the law of constitutional estoppel has become, the brief in opposition strengthens the case for review by this Court. Clearly the issue is an important one for constitutional adjudication — especially when the doctrine is used as a bar to Appointments Clause challenges, which have special significance in our federal system. *See Freytag v. Commissioner*, 501 U.S. 868, 880 (1991). A writ of certiorari should be issued to review the decision of the court of appeals.

Respectfully submitted,

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